



The Role of Regional Organisations in Upholding Credible and Legitimate Electoral Processes in Africa

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Democratic elections matter, but how much they matter depends entirely on how free, open and fair they are. Elections remind us not only of the rights, but the responsibilities of citizenship in a democracy.

Elliott Abrams & Robert Kennedy

DECLARATION

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DEDICATION

This dissertation is dedicated to my mother, Tabeth Manyadzi, who inspires me in many ways. Thank you, mother, for the love and support. To my sponsors, the Mastercard Foundation, I dedicate this work. To God my Creator, I surrender my life.

ACKNOWLEDGMENTS

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LIST OF ABBREVIATIONS

ACRONYM	DESCRIPTION
ACHPR	African Charter on Human and Peoples' Rights
ACDEG	African Charter on Democracy Elections and Good Governance
AEC	African Economic Community
AFRC	Armed Forces Revolutionary Council
AU	African Union
AUDGDEA	African Union Declaration Governing Democratic Elections in Africa
AUPW	African Union Panel of the Wise
DRC	Democratic Republic of Congo
DUCG	Declaration on Unconstitutional Change of Government
ECOWAS	Economic Community of West African States
ECOMOG	Economic Community of West African States Cease-Fire Monitoring Group
ICCPR	International Covenant on Civil and Political Rights
MDC	Movement of the Democratic Change
OAU	Organization of African Unity
PSC	Peace and Security Council
RECs	Regional Economic Communities
SADC	Southern African Development Community
UCG	Unconstitutional Change of Government
UN	United Nations

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ABSTRACT

Regional Organizations hereinafter referred as Regional Economic Communities (RECs) are the building blocks of the African Union. They promote regional integration, democratization, cooperation, development and peace and security within African States. RECs complement the instruments of the AU on democracy consolidation and its shared norms and values. Since elections are at the centre for democracy, development and human rights, RECs have a mandate to protect and promote them. Protection and promotion of democratic elections have become a priority among the RECs. RECs have adopted legal instruments to protect democratic elections. They observe elections within Member States. They effectively conduct pre- and post-electoral audits to facilitate smooth conduct of elections. They facilitate mediation when electoral disputes arise. RECs also facilitate political negotiations and dialogues in times of electoral conflicts. They enhance restoration of democracy when it is violated. They assist with interventions when governments act unconstitutionally and refuse to step down from power. In some cases, they impose sanctions, where necessary, to states violating democracy and human rights. Thus, the role of the RECs is dynamic and has been expanding over the years to meet the needs of their regions.

However, despite the establishment of RECs, and their mandates in supporting consolidation of democracy, election disputes have been prevalent in Africa. Electoral malpractices have been in the form of vote rigging, manipulation of vote results, refusal of incumbent heads of state to step down after losing elections to mention a few. This happened in the Gambia in 2016 as discussed in this study. In some cases, independent electoral commissions have committed gross errors in vote counting as in the case of Zimbabwe 2018 elections. These errors have caused election disputes and political uprisings. Election monitoring bodies have also failed to provide accurate reports on the outcome and conduct of elections and have caused a cycle of contested elections in some African countries. The case of the SADC Observer Mission in Zimbabwe is a good example in this study. Elections that have lacked credibility and integrity have led to crises of legitimacy in governance.

The lack of legitimacy and credibility of elections have undermined human rights and freedoms linked to democratic elections. This research argues that contestations over elections should not be seen in isolation from the entire human rights discourse. Human rights are interdependent and, therefore, when one right is affected other rights suffer in turn. Protection of a single right such as, the right to vote, has a positive impact to the realisation of many human rights.

CHAPTER ONE: INTRODUCTION

1.1 Background to the Study

The African Union (AU) has adopted several relevant instruments for the promotion and protection of democratic elections in Africa.¹ However, the AU has not always been effective in contributing to credible and legitimate elections in Africa.² In fact, electoral disputes have become more frequent.³ The prevalence of election disputes erodes democracy, good governance and human rights.⁴ Scholars argue that disputed elections weaken democratic institutions⁵ and the process of democratization in Africa.⁶ Studies suggest that democratisation is an on-going process that is supported by regular, free, fair, credible and legitimate electoral processes.⁷ More so, studies also point out that military coups have undermined democratic elections and eroded democratic principles among African states.⁸ Elections that are free from these violations are instrumental for democratic and peaceful transfer of power.⁹

Disputed elections arise from electoral malpractices. These include vote rigging, human error,¹⁰ falsification of results, manipulating the constitution before an election and thuggery.¹¹ Other malpractices are vote buying, manipulation of the voters roll and the refusal of incumbent governments to step down after losing elections, among others.¹²

¹ These include: The Constitutive Act of the AU of 2000; the Protocol on the Pan-African Parliament 2001; the Protocol on the Peace and Security Council 2002; the African Charter on Democracy, Elections and Governance 2007; to mention a few.

² T Alemu 'The African Charter on Democracy, Elections and Governance: A Normative Framework for Analysing Electoral Democracy in Africa' (2007). Centre for Human Rights, University of Pretoria.

³ These include but not limited to: Egypt (2005), Ethiopia (2005, 10), Uganda (2006, 11), Nigeria (2007), Kenya (2007-8, 2013), Zimbabwe (2008, 2013, 2018), Algeria (2009, 14), Libya (2014), Malawi (2014,18), Zambia (2015), Sudan (2015), Togo (2015), Burundi (2015) and DRC (2016-18) and Gambia (2016/17).

⁴ Alemu op cit note 2

⁵ *Ibid.*

⁶ Ndubuisi Christian Ani 'ISS Today: How serious is the African Union about democracy'? *The Daily Maverick* 1 October 2018, available at <https://www.dailymaverick.co.za/article/2018-10-01-how-serious-is-the-african-union-about-democracy>, accessed 3 July 2019. See also, O Oko 'Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa' (2000) 33 *Vanderbilt Journal of Transnational Law* 573 at 578

⁷ Tikikel Alemu *The African Charter on Democracy, Elections and Governance: A Normative Framework for Analysing Electoral Democracy in Africa* (unpublished LLM thesis, University of Pretoria, 2007).

⁸ This has been demonstrated, for example, in the cases of the Central African Republic (2003), Togo (2005), Mauritania (2005), Comoros (2007), Guinea (2008), Madagascar (2009), Niger (2010), Mali (2012), Guinea-Bissau (2012) and Egypt (2014) to mention a few.

⁹ The Role of Elections in strengthening democracy principles and values. Available at: <https://agora-parl.org/interact/blog/role-elections-strengthening-democracy-principles-and-values>, accessed on 31 March 2019.

¹⁰ British-Angola Forum Conference Report *Challenges for free and fair elections in Angola*, available at http://aceproject.org/ero-en/regions/africa/AO/BAFelections.pdf/at_download/file, accessed on 31 March 2019.

¹¹ *Ibid.*

¹² C Daniel 'Election rigging and how to fight it' (2006) 17 *Journal of Democracy* 138.

Elections have become central to democracy, good governance and human rights.¹³ Elections remind people not only of their rights, but the responsibilities of citizenship in a democracy.¹⁴ Through elections, people can exercise their rights. For example, people can take part in the conduct of public affairs of their country, directly or through freely chosen representatives.¹⁵ Furthermore, people also have access to public service in their country. These rights are socio-economic and civil and political. Socio-economic rights incorporate the right to work, the right to an acceptable standard of living; including food, clothing, and housing, the right to physical and mental health, the right to social security, the right to a healthy environment, and the right to education, to mention a few.¹⁶ Through voting, citizens participate in a civic society and demonstrate the importance of their voice. Elections also facilitate the realisation of civil and political rights. These include:

the right to vote, the freedom of opinion and expression; freedom of peaceful assembly and association; the right to take part in the government of one's country through freely elected representatives; the right of equal access to public service in one's country; and the recognition that the authority of government derives from the will of the people, expressed in genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot.¹⁷

The lack of protection of the democratic elections is at the core of democratic problems and violation of human rights in Africa.¹⁸ A true democracy is a place where numerous free and fair elections are held without disputes and with interchangeable candidates. When elections are disputed, a government's credibility and legitimacy is compromised.¹⁹ Credible and legitimate elections are thus the cornerstone which guarantees governments' legitimacy. Some scholars argue that elections confer legitimacy to incumbent governments.²⁰ Without legitimacy, leaders and officials lack accountability to the public.²¹ Disputed elections may also result in the lack of confidence from the public and the electorate.²² Electoral integrity

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Art 21 of the Universal Declaration of Human Rights, 1948.

¹⁶ Centre for Economic and Social Rights 'Twenty-Five Years Fighting for Social Justice through Human Rights. What are Economic, Social and Cultural rights?' available at <http://www.cesr.org/what-are-economic-social-and-cultural-rights>, accessed on 21 August 2019.

¹⁷ See Art 21 of the Universal Declaration of Human Rights, 1948.

¹⁸ Daniel op cit note 12.

¹⁹ For example, in Zimbabwe the legitimacy of elections has been highly contested by opposition parties after the 2002, 2008, 2013 and 2018 presidential elections.

²⁰ D Nohlen, M Krennerich & B Thibaut *Elections in Africa: A Data Handbook* (1999) 12.

²¹ *Ibid.*

²² *Ibid.*

is therefore important because it does not only guarantee human rights, but allows good governance which is a tool that fosters peaceful resolution of conflicts which is important for peace and security of the continent. Electoral integrity also fosters open dialogue, debate and information sharing among leaders and the public.²³ To ensure that elections have integrity and credibility, other factors outside of the electoral institutions need to be considered and strengthened. These include credible election officials and management bodies. Judges and courts must have the independence that the public respects.²⁴

Credible and legitimate elections are instrumental in advancing and enhancing the sovereignty of the people.²⁵ The notion of sovereignty is reflected under the right to participation in international law which asserts that citizens are the ultimate repository of state sovereignty.²⁶ In sovereignty, true depiction of the will of the people can be reflected if international and regional standards of free and fair elections are fulfilled.²⁷ The United Nations and the African Union have developed international and regional legislative frameworks to regulate standards for democratic elections.²⁸ These standards are, therefore, a threshold upon which democracy, human rights, good governance, development, peace and security and the sovereignty of the people may be realised.

Credibility and legitimacy of elections are measured by international²⁹ and regional laws on democratic elections.³⁰ Various instruments, both binding and non-binding, have been adopted at international,³¹ regional³² as well as sub- regional levels³³ in an attempt to redress conflicts

²³ M Wiebusch 'International Institute for Democracy and Electoral Assistance Discussion Paper 17' *The role of regional organizations in the protection of constitutionalism* (2016) at 61.

²⁴ *Ibid.*

²⁵ G Fox 'The Right to Participation in International Law' in G Fox and B R Roth (eds) *Democratic Governance and International Law* (2000) 50.

²⁶ *Ibid.*

²⁷ N Steytler, J Murphy, P de Vos & M Rewlamira *Free and Fair Elections* (1994) XXI.

²⁸ For example, the United Nations has adopted the Declaration of Principles for International Election Observation and The Code of Conduct for International Election Observers (2005), African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002.

²⁹ See Declaration of Principles for International Election Observation and The Code of Conduct for International Election Observers (2005), See also, UN Committee on Human Rights, General Comment 25, 'The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service,' 1510th meeting (fifty seventh session).

³⁰ Guidelines for African Union Electoral Observation and Monitoring Missions, 2002.

³¹ These include: Art 21 of the Universal declaration of Human Rights (UDHR); Art 25 of the International Covenant on Civil and Political Rights, Art 13 African Charter on Human and Peoples' Rights.

³² The African Charter on Democracy, Elections and Governance (ACDEG) is the main regional and binding instrument that governs democratic elections. Other instruments are the African Charter; the Constitutive Act of the African Union (2000/1); the Protocol to the Peace and Security Council; the Guidelines for the Electoral Observation Missions (2004), the Ezulwini Framework (2009) among others.

³³ These include SADC Guidelines on Democratic Elections, ECOWAS Protocol on Democracy and Good Governance to mention a few.

over democratic elections.³⁴ Internationally, there are guidelines and principles stipulated for democratic elections.³⁵

In Africa, the African Charter on Democracy, Elections and Governance (ACDEG) is the main legal instrument that governs regional standards on democratic elections.³⁶ The ACDEG is, among others, a framework upon which democratic elections in Africa are measured. Regional Economic Communities (RECs) within the African Union have also developed various instruments to uphold credible and legitimate elections in their regions.³⁷ Thus, the international and regional standards of democratic elections provide the normative basis upon which elections are considered credible and legitimate. These standards are enforced by the regional organisations. However, states have been increasingly failing to adhere to the regulations of the international and regional norms regarding democratic elections.³⁸

1.1.1 What are Regional Economic Communities?

Regional Economic Communities are regional groupings of the African Member States of the African Union.³⁹ The AU comprises of 55 Member States⁴⁰ and was established in 2002⁴¹ upon the transformation of the Organization of African Unity (OAU) into the AU.⁴² Its purpose was to play an essential role in the global economy and to address multifaceted social, economic and political problems in the global arena.⁴³ To achieve this, the AU developed a normative framework to protect constitutionalism, particularly the constitutional transfer of power to foster stability, security, and democratic state building.⁴⁴ Over the years, RECs have adopted new and important roles. These roles include establishing violation of constitutional order among Member States, enforcing normative frameworks on constitutional governance,

³⁴ See note 29.

³⁵ See note 27.

³⁶ The African Charter on Democracy, Elections and Governance, Adopted by the AU in 2007.

³⁷ See note 30.

³⁸ For example, the following states: Egypt (2005), Ethiopia (2005, 10), Uganda (2006, 11), Nigeria (2007), Kenya (2007-8, 2013), Zimbabwe (2008, 2013, 2018), Algeria (2009, 14), Libya (2014), Malawi (2014), Zambia (2015), Sudan (2015), Togo (2015), Burundi (2015) and DRC (2016-18) have experienced electoral disputes.

³⁹ The African Union 'Regional Economic Communities (RECs)'. Available at: <https://au.int/en/organs/recs>, accessed 5 June 2019.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

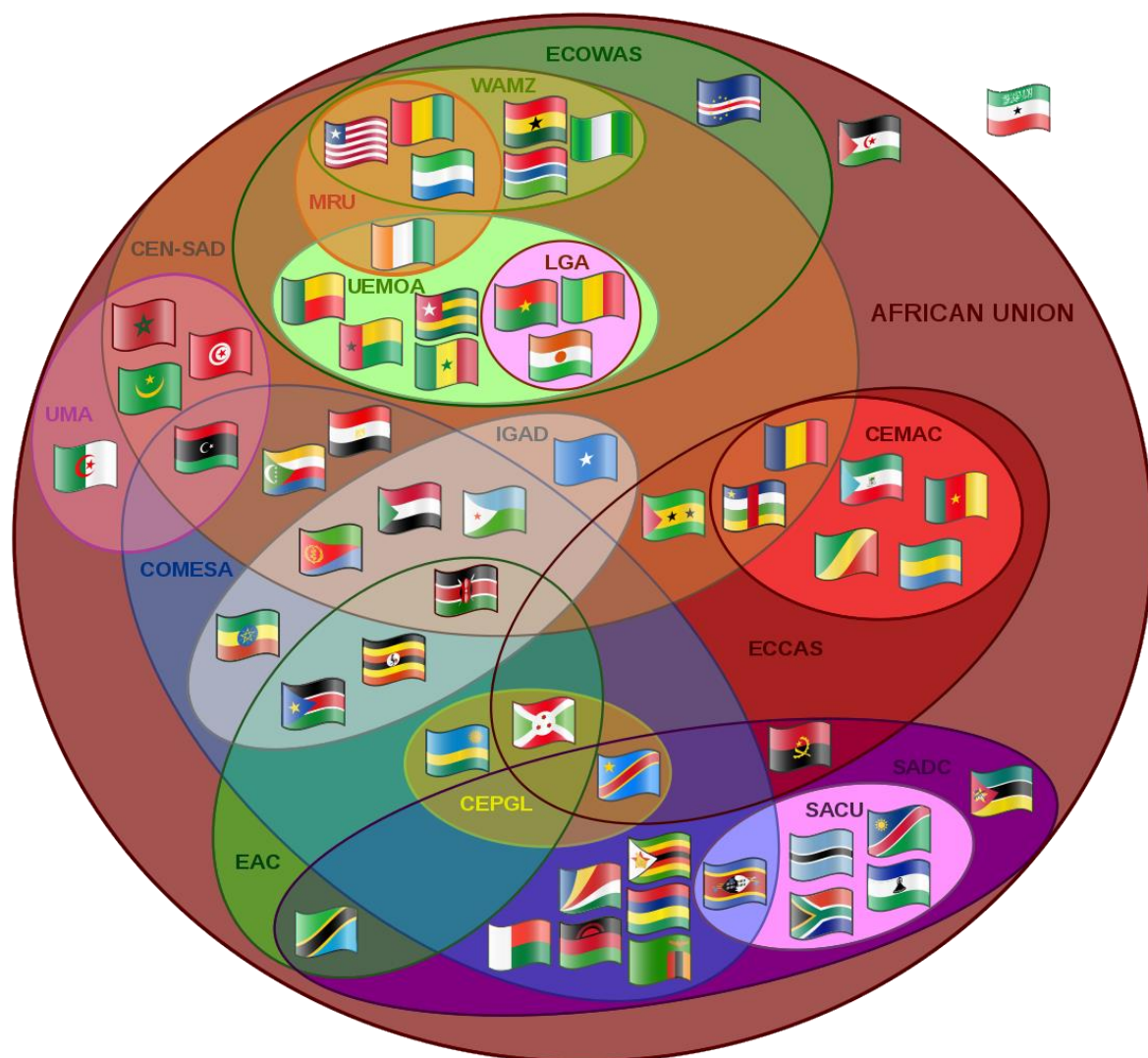
⁴² The Charter of the Organization of African Unity (1963). Adopted in Addis Ababa, Ethiopia, on 25 May 1963. The Charter was replaced in 2001 by the Constitutive Act of the African Union.

⁴³ The African Union 'Regional Economic Communities (RECs)'. Available at: <https://au.int/en/organs/recs>, accessed 5 June 2019.

⁴⁴ M Wiebusch op cit note 22.

developing proportional sanctions and facilitating return of constitutional order within Member States.⁴⁵

There are eight RECs officially recognised by the African Union. These are the Arab Maghreb Union (AMU), Community of Sahel-Saharan States (CEN-SAD), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC).⁴⁶ See figure below.⁴⁷



⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Centre for Human Rights. MOOC Module 1. 'Introduction to the African Regional Human Rights System'. Available at: <https://www.chr.up.ac.za/mooc>, accessed 30 September 2019.

Figure 1. The picture above illustrates the Regional Economic Communities of the African Union. The flag outside the AU circle is that of Somaliland which for many years has functioned as an independent state but has not been recognised by other states and is, thus, not a member of RECs.⁴⁸

These regional institutions are contributing substantially to democratization,⁴⁹ integration, cooperation and peacebuilding in their communities.⁵⁰ They have enacted instruments that complement the instruments of the AU.⁵¹ For example, on democratic elections the SADC region has adopted Principles and Guidelines Governing Democratic Elections,⁵² the ECOWAS has adopted the Protocol on Democracy and Good Governance.⁵³ These instruments also establish mechanisms such as courts that are making a significant contribution to the protection of human rights on the continent.⁵⁴

Within the RECs, courts or regional tribunals have been established. RECs courts provide supra national protection of human rights in Africa. The courts are charged with resolving disputes related to the REC's treaty, protocols and conventions. The courts also have competence to hear individual complaints of alleged human rights violations. For example, under the SADC, a Tribunal was established in 1992. The Tribunal played an important role in dealing with violations of human rights among SADC Member States.⁵⁵ However, the challenge within the SADC is that the Tribunal existed from 2005 until 2012 and have since been suspended.⁵⁶ It is alleged that the suspension of the Tribunal came after President Mugabe of Zimbabwe had failed to comply with the decisions of the Tribunal.⁵⁷ The tribunal had brought down on its head the full wrath of the Robert Mugabe-led Zimbabwean government when it issued several

⁴⁸ Centre for Human Rights. MOOC Module 1. Introduction to the African Regional Human Rights System. Available at: <https://www.chr.up.ac.za/mooc>, accessed 30 September 2019.

⁴⁹ Democratization include promoting credible and legitimate electoral processes.

⁵⁰ The African Union 'Regional Economic Communities (RECs)' op cit note 36.

The African Union. Available at: <https://au.int/en/organs/recs> (Accessed 5 April 2019).

⁵¹ These instruments include Protocols, Treaties, Guidelines, Plans of action and Model laws. They deal with democracy, good governance, the conduct of elections, and the promotion and protection of human rights to mention a few.

⁵² SADC 'Principles and Guidelines Governing Democratic Elections', Revised, 2015.

⁵³ ECOWAS Protocol on Democracy and Good Governance, 2001.

⁵⁴ O C Ruppel *Regional Economic Communities and Human Rights in East and Southern Africa*, 2009. See also, D Abebe 'Does International Human Rights Law in African Courts Make a Difference?', *Virginia Journal of International Law* 527 (2016).

⁵⁵ *Ibid.*

⁵⁶ Mail and Guardian 'Quiet death of an important SADC institution', available at <https://mg.co.za/article/2014-08-29-quiet-death-of-an-important-sadc-institution>, accessed 2 October 2019

⁵⁷ *Ibid.*

judgments against Zimbabwe.⁵⁸ The Tribunal's first verdict at the end of 2008 was already a landmark case. Zimbabwe had enforced a highly controversial land redistribution policy in the early 1990s.⁵⁹ The Tribunal decided in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* that the government's seizure of land owned by white farmers was indirect or 'de facto' discrimination and therefore unconstitutional and that the plaintiffs were entitled to compensation.⁶⁰ Following this decision, Zimbabwe threatened to pull out of the SADC Tribunal, challenging its legitimacy.⁶¹

The tribunal also found no champions among other SADC heads of state who, despite having initially agreed to permit individual access, found the prospect of being held liable to their citizens by a regional body distasteful.⁶² The Tribunal's role has been reduced to jurisdiction over disputes among SADC member states, which deprives the court's powers to a great extent and makes complaints by citizens against their governments impossible.⁶³ This was a disgrace that an international instrument for individual complaints against human rights violations was suspended.⁶⁴ Therefore, when elections are violated, especially in the case of Zimbabwe, the citizens have challenges in taking their governments to the tribunal since the tribunal no longer has jurisdiction over such matters.

Unlike the SADC region, citizens of ECOWAS member states can file complaints against human rights violations of state-actors at the regional court of justice (ECOWAS court of justice). The Gambia, as a member of the ECOWAS, has access to this court.⁶⁵ The ECOWAS Court of Justice has already made several rulings on human rights issues. In 2008 the Court took a landmark decision concerning slavery where the State of the Niger was convicted, having violated the human rights of one of its citizens Mrs Hadijatou Mani.⁶⁶ While the Court

⁵⁸ *Mike Campbell (Pvt) Ltd. and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* (124/06).

⁵⁹ Oliver C. Ruppel & F X Bangamwabo *Chapter 8 The SADC Tribunal: A legal analysis of its mandate and role in regional integration*, 2008 at 3.

⁶⁰ *Mike Campbell (Pvt) Ltd. and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* (124/06).

⁶¹ 'Centre for Human Rights Welcomes Constitutional Court's Judgment on the invalidity of the disbandment of the SADC tribunal', 2018. Available at: https://www.up.ac.za/faculty-of-law/news/post_2740045-centre-for-human-rights-welcomes-constitutional-courts-judgment-on-the-invalidity-of-the-disbandment-of-the-sadc-tribunal, accessed 20 October 2019.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Economic Community of West African States Court of Justice, available at <https://www.justiceinitiative.org/publications/ecowas-community-court-justice>, accessed 21 October 2019.

⁶⁶ *Ibid.*

found that Niger was not itself responsible for the discrimination, the country was found in violation of its international obligations to protect Mrs Hadijatou Mani from slavery under international as well as national law.⁶⁷ This was due to Niger's tolerance, passivity, inaction, and abstention regarding the practice.⁶⁸ Niger had to pay reparations in the amount of 10 million francs (CFA), an amount equivalent to more than 20,000 US-Dollars.⁶⁹ The judgment has been referred to as historic, because this is one of the first slavery cases ever won at the international level.⁷⁰

Similarly, in 2012 the Constitutional Council of Senegal endorsed President Abdoulaye Wade as a presidential candidate for a third term. On the 16th of February 2012, RADDHO, a non-governmental organisation based in Dakar, Senegal, lodged a complaint to the ECOWAS Community Court of Justice against the government of the Republic of Senegal.⁷¹ Although President Abdoulaye lost the election, the ECOWAS Court of Justice had made attempts to resolve the dispute on his bid for a third term.⁷²

Within the AU, RECs exist as subsidiary organizations of the Union.⁷³ RECs were formed for several reasons which are mostly rooted in the desire for economic and political cooperation of the AU.⁷⁴ Their objectives are to promote regional economic welfare, collective self-reliance and regional integration.⁷⁵ RECs play an important role in African governance as they advance the AU's shared values, norms, and standards regarding continental unity.⁷⁶

In Africa, the Abuja Treaty of 1991 sought to establish RECs through an African Economic Community (AEC). The treaty emphasised the desirability of solidarity, collective self-reliance, a self-sustained, endogenous development strategy and a policy of self-sufficiency in

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Case no. ECW/CCJ/APP/03/12.

⁷² ECOWAS Court adjourns Senegal case for hearing on 4 May 2012, Centre for Human Rights, University of Pretoria.

⁷³ The African Union was founded on 26 May 2001 in Addis Ababa, Ethiopia and launched on 9 July 2002 in South Africa. The intention of the AU was to replace the Organisation of African Unity (OAU), established on 25 May 1963 in Addis Ababa by 32 signatory governments

⁷⁴ See note 36

⁷⁵ *Ibid.*

⁷⁶ African Governance Architecture, 'The Africa Governance Report: Promoting African Union Shared Values' (2019). The African Peer Review Mechanism (APRM) in Collaboration with the African Governance Architecture (AGA), accessed 30 June 2019.

basic needs.⁷⁷ RECs are regarded the building blocks of the AU.⁷⁸ Their relationship with the AU is mandated by the Abuja Treaty and its Constitutive Act.⁷⁹ The functional relationship between the AU and the RECs is guided by the following: the 2008 Protocol on Relations between the RECs and the AU, the Memorandum of Understanding (MoU) on Cooperation in the Area of Peace and Security between the AU and RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern and northern Africa.⁸⁰

RECs have played an important role in facilitating the enforcement of the AU's shared values, particularly in situations involving unconstitutional changes of governments.⁸¹ These include sanctions, suspensions, mediation or military intervention. For example, RECs such as the Economic Community of West African States (ECOWAS), have been actively managing conflicts and preventing movement toward authoritarianism.⁸² Among the RECs, ECOWAS has been the most effective, with Nigeria serving as a strong anchor and advocate for democratization and peacekeeping.⁸³

The ECOWAS has intervened against, sanctioned and condemned actions taken by most of its Member States over the past two decades.⁸⁴ It has organized peaceful resolutions and restored constitutional governments in Burkina Faso, Côte d'Ivoire, and the Gambia, among others.⁸⁵ Other RECs, such as the Southern African Development Community (SADC) and the East African Community (EAC), have also organized collective stabilization efforts and sought to advance democratic governance. However, they have been less successful.⁸⁶ RECs have successfully contributed to democracy promotion and conflict management initiatives, including peace-making and peacekeeping, in numerous countries, such as Burundi, the Central African Republic (CAR), the Democratic Republic of the Congo (DRC), Gambia, Lesotho, Mali, South Sudan, and Somalia'.⁸⁷

⁷⁷ The Treaty Establishing the African Economic Community Adopted 3 June 1991, Abuja, Nigeria.

⁷⁸ African Governance Architecture op cit note 55.

⁷⁹ *Ibid* pg. 61.

⁸⁰ *Ibid*, pg. 61-2.

⁸¹ G M. Khadiagala 'Regional Cooperation on Democratization and Conflict Management in Africa' *Carnegie Endowment for International Peace Publications*, 2016.

⁸² *Ibid*, pg 1.

⁸³ *Ibid*, pg 1.

⁸⁴ *Ibid*, pg 1.

⁸⁵ *Ibid*, pg 1.

⁸⁶ *Ibid*, pg 1.

⁸⁷ *Ibid*, pg 1.

1.1.2 The Importance of RECs in Democratic Elections in Africa

RECs are increasingly playing an important role in promoting free, fair, credible and legitimate elections.⁸⁸ For example, RECs have been engaged in resolving post-electoral conflicts in Kenya (2007), Côte d'Ivoire (2010), Gambia (2016/17) and Zimbabwe (2008).⁸⁹ Over the years RECs have been protecting and promoting the integrity of elections. RECs have also encouraged electoral responsibility among Member States at the national level.⁹⁰ Their mandate has also extended to mediation of electoral disputes, imposing sanctions and suspensions on Member States who are guilty of violating democratic elections.⁹¹

RECs have adopted legal instruments in their specific regions to regulate the conduct of democratic elections. As earlier mentioned, SADC has adopted Guidelines and Principles for Democratic Elections while ECOWAS has adopted a Protocol on Democracy and Good Governance. All these instruments advance the AU's shared norms and values on democratic elections. More so, RECs have been taking initiatives to deploy teams to observe elections in their Member States. In some cases, this process entails sending fact-finding teams ahead of the missions to study and assess the general environment prior to the elections.⁹²

1.1.3 The Role of RECs in Promoting and Protecting Legitimacy and Credibility of Elections

RECs play an important role in fostering the integrity of elections. Legitimacy refers to people's (electorates') beliefs about political authority and political obligations.⁹³ Legitimacy also means a relationship between the people and their government. This often results from people participating in the selection of their government. A political regime is legitimate because it is selected and accepted by its people. Electorates have confidence in it and accept it.⁹⁴ Thus, the legitimacy of political authority in the civil state depends on whether the transfer of authority has happened in the right way.⁹⁵ This means tacit consent to the social contract and

⁸⁸ R Cordenillo & A Ellis *The Integrity of Elections: The Role of Regional Organizations Stockholm: International Institute for Democracy and Electoral Assistance* (2012) at 15.

⁸⁹ M Wiebusch op cit note 21 at 61.

⁹⁰ R Cordenillo & A Ellis op cit note 67 at 15.

⁹¹ For example, in 2008 SADC mediated electoral dispute in Zimbabwe between Robert Mugabe and Morgan Tsvangirai after a highly contested election between the two leaders.

⁹² University of South Africa, 'Management of Democratic Elections in Africa', 2014.

⁹³ W Mommsen *The Political and Social Theory of Max Weber* (1989) at 20.

⁹⁴ M Webber *The Theory of Social and Economic Organization* (1964) at 382.

⁹⁵ J Locke *Second Treatise on Civil Government* 2nd ed (1960) at 52.

to be bound to obey a state's laws.⁹⁶ Legitimacy morally justifies the existing authority such that the claims of the authority become moral obligations.⁹⁷

1.1.4 What Constitutes a Credible and Legitimate Electoral Process

Elections are not just about who votes but also who doesn't vote. A credible and legitimate electoral process is one that meets regional and international standards of democratic elections. There are several pointers that makes an election credible. These include but are not limited to inclusivity, transparency, accountability and competitiveness.

A credible election is one in which all citizens are treated equally despite the circumstances surrounding their lives. All parties contesting for an election must be accorded the same treatment. In addition, barriers must be removed for traditionally marginalized populations. These include ethnic, religious or linguistic minorities, women, youth or elderly citizens; and persons with disabilities.⁹⁸

Credible elections must be trusted by the electorates and all participants. The credibility of an election is enhanced when all stakeholders, including RECs, can independently verify whether the process is conducted honestly and accurately. The principle of transparency is linked to the fundamental right of citizens to seek, receive and impart information (which are elements of the freedom of expression), as well as the right to take part in government and public affairs.⁹⁹ Decision making processes must be open to scrutiny, and reasonable opportunities for public input should be provided. Information relating to all stages of the electoral cycle must be made available and accessible to citizens, including voters and candidates. Nonpartisan and partisan observers should be accredited to observe all phases of the electoral process and be permitted to comment publicly on the process free from unreasonable restriction.

Accountability in elections is critical for the credibility of an election outcome. Accountability refers to the rights of citizens with respect to the conduct of other electoral stakeholders, including the government, election management bodies (EMBs), political parties, candidates

⁹⁶ *Ibid* at 60.

⁹⁷ A W Edmundson *Three Anarchical Fallacies* (1988).

⁹⁸ For a more detailed discussion of these principles, see Promoting Legal Frameworks for Democratic Elections: An NDI Guide for Developing Laws and Law Commentaries, Section Two (2008), also published in J H Young *International Election Principles: Democracy & the Rule of Law* (2009).

⁹⁹ Merloe, Patrick. "Human Rights-The Basis for Inclusiveness, Transparency, Accountability and Public Confidence in Elections", in J H Young *International Principles: Democracy & the Rule of Law* (2009) at p 3& 18-20.

and security forces. Elections are not about records; they are about plans and choices of the people. Therefore, elections are a key mechanism through which citizens hold their governments accountable, but there should be accountability within electoral processes themselves.¹⁰⁰ There ought to be effective remedies in place for violations of citizens' election-related rights.¹⁰¹ There must also be administrative accountability for those organizing elections and those conducting governmental activities related to elections.¹⁰² In addition, there has to be timely procedures to bring to account those who conduct criminal acts that affect electoral-related rights.¹⁰³

Credible and legitimate elections must be competitive.¹⁰⁴ Citizens must be accorded reasonable and equitable opportunities to compete to be elected to governmental offices. Political competition is a central component of elections that truly reflects the will of the people. The principle of competitiveness relates to aspects of the election throughout the electoral cycle.¹⁰⁵ Credible elections are those in which citizens are free to represent their interests on the ballot for parties and/or candidates of their choice.¹⁰⁶ Parties and candidates must be able to campaign and voters to cast their ballots free from illegal influence, intimidation or violence.¹⁰⁷

1.2 Problem Statement

In the presence of the legislative framework governing democratic elections in Africa and among the RECs, most African countries have held regular elections, albeit often flawed and contested.¹⁰⁸ In the past decade, the RECs have been challenged by persistent governance deficits.¹⁰⁹ Several reports have pointed to this effect.

¹⁰⁰ Dube N. 'Impunity from accountability for election crimes: Analysis of crimes committed by Zimbabwe authorities and ZANU-PF militia during the 2008 election', University of Pretoria 2008.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ See Press release of the African Union. Available at: <https://www.au.int/web/en/pressreleases/20170216/au-commemorates-10th-anniversary-adoption-african-charter-democracy-elections>, accessed on 30 August 2019.

The 2017 Democracy Index indicates that many African countries remain under authoritarian and hybrid regimes.¹¹⁰ Their democratic institutions have serious weaknesses.¹¹¹ A 2016 Institute of Security Studies (ISS) study highlights that democracy in Africa often fails to translate into development because of the lack of governance capacity among leaders.¹¹² According to the report, many leaders come to power through patronage networks and rigged elections a situation created by the relative absence of competitive electoral systems.¹¹³ The Ibrahim Index of African Governance (IIAG) of 2017 also affirms that there has been an overall decline in good governance and electoral systems in Africa.¹¹⁴ In addition, the 2018 Freedom House findings show that the transfer of power to ‘new leaders from old parties may fail to bring reform’.¹¹⁵

In Zimbabwe, for instance, the new regime that replaced former President Robert Mugabe continues to use heavy-handed military measures to quash dissent.¹¹⁶ Until today, Zimbabwe has not achieved electoral reforms suitable for free and fair democratic elections.¹¹⁷ Other states that have experienced challenges with electoral democracy in the recent past are the Republic of the Gambia (2016-7),¹¹⁸ where the President of Gambia refused to step down after losing an election. In the DRC (2018)¹¹⁹ the elections were highly contested and there were delays in announcing elections results. In Sudan (April 2019) the civilians were killed and brutalised for calling for civilian government in preparation for free and fair elections after the fall of the former president Omar al-Bashir.¹²⁰ Malawi (2019) had a highly contested election result after

¹¹⁰ ISS/PSC Report ‘Is the African Charter on Democracy Strong Enough?’ available at <https://issafrica.org/pscreport/psc-insights/is-the-african-charter-on-democracy-strong-enough>, accessed on 31 July 2019.

¹¹¹ *Ibid.*

¹¹² Cilliers J. Institute of Security Studies (ISS), ‘The future of Democracy in Africa’ (2016), available at <https://issafrica.org/research/papers/the-future-of-democracy-in-africa>, accessed on 20 June 2019.

¹¹³ *Ibid.*

¹¹⁴ Mo Ibrahim Foundation ‘1/3 of Countries driving overall improvement in African governance, however many fail to build on prior progress’, available at: <https://mo.ibrahim.foundation/iiag/2017-key-findings/>, accessed 1 July 2019.

¹¹⁵ Freedom in the World ‘Democracy in Crisis’ available at <https://freedomhouse.org/report/freedom-world/freedom-world-2018>, accessed 1 July 2019.

¹¹⁶ *Ibid.*

¹¹⁷ The Daily Maverick ‘Opposition MDC protests for electoral reforms’ 6 June 2018, available at: <https://www.dailymaverick.co.za/article/2018-06-06-opposition-mdc-protests-for-electoral-reforms/> accessed 1 July 2019.

¹¹⁸ BBC News ‘Gambian leader Yahya Jammeh rejects election result’ 10 December 2016, available at <https://www.bbc.com/news/world-africa-38271480>, accessed 4 July 2019.

¹¹⁹ BBC News ‘DR Congo election: Presidential poll hit by delays’ 30 December 2018, available at <https://www.bbc.com/news/world-africa-46712759>, accessed 5 July 2019.

¹²⁰ BBC News ‘Sudan crisis: What you need to know’ 13 June 2019, available at <https://www.bbc.com/news/world-africa-48511226>, accessed 5 July 2019.

the incumbent narrowly won the election.¹²¹ The governments of Zimbabwe and the Gambia are used as case studies in this paper. These governments have abdicated their responsibility to uphold credible and legitimate electoral processes in the past.

Scholars also suggest that elections in Africa are ‘subject to human error and manipulation and it is mainly because incumbent governments want to cling to power especially ‘in poor countries’.¹²² In the past, the role of RECs has been undermined by an increase in the number of AU Member States experiencing electoral disputes. These Member States include but are not limited to Egypt (2005), Ethiopia (2005, 10), Uganda (2006, 11), Nigeria (2007), Kenya (2007-8, 2013), 2013, Algeria (2009, 14), Libya (2014), Malawi (2014, 2019), Zambia (2015), Sudan (2015), Togo (2015), Burundi (2015).¹²³ When democratic elections are disputed, and when there is no public confidence in the elections, democracy is likely to suffer. Therefore, elections should be respected and be conducted according to the law. Since elections are flawed and have been in most cases not conducted according to the law, this study seeks to explore the role of RECs in the promotion and protection of democratic elections.

1.3 Aims and Objectives of the Study

This study aims to investigate the role of RECs in upholding credible and legitimate electoral processes. The objectives of the study are:

- a) To identify ways in which the RECs resolve electoral disputes, uphold legitimacy and credibility of electoral processes in Africa;
- b) To examine the importance of RECs and ways in which the RECs may promote legitimacy and credibility of electoral outcomes;
- c) To examine the importance of legitimacy and credibility of electoral outcomes; and
- d) To make recommendations on the emerging practice of legalising electoral outcomes without legitimacy and credibility within the AU.

¹²¹Frank Jomo ‘Protesters Loot in Malawi as President Challenge Goes to Court’ *Bloomberg* 7 August 2019, available at <https://www.bloomberg.com/news/articles/2019-08-06/election-dispute-in-malawi-heats-up-as-fresh-protests-erupt>, accessed on 10 August 2019.

¹²² British-Angola Forum ‘Challenges for free and fair elections in Angola’ *Conference Report* 4-5 July 2005, available at http://aceproject.org/ero-en/regions/africa/AO/BAFelections.pdf/at_download/file, accessed on 31 March 2019.

¹²³Maendeleo Policy Forum ‘Elections in Sub-Saharan Africa-UNDP in Africa. General Trends, Challenges, and Opportunities’ 5th & 6th ed, available at <http://www.africa.undp.org/content/dam/rba/docs/Reports/undp-rba-maendeleo-elections-subsahara-africa-2016.pdf>, accessed 25 June 2019.

1.4 Significance of the Study

Over the years, electoral disputes have become more prevalent in Africa. There have been serious complaints and contestations from many African states arising from electoral disputes which the Regional Organizations have attempted to resolve.¹²⁴ This study seeks to discuss the role of RECs in upholding credible and legitimate electoral processes in Africa. This will give an insight in the protection of democratic elections within African states. There is need to research on the possibility of an effective standard of intervention among RECs in case of electoral disputes. Democratic institutions within some RECs in Africa have been vulnerable and have continued to suffer for lack of a proper regulatory enforcement protection. This has often led to impunity.

This study is significant because it will analyse the role of RECs in upholding legitimate and credible electoral processes. Legitimate and credible electoral processes have the potential to strengthen democratic institutions in Africa. Strong democratic institutions are undermined and eroded by the lack of free, fair, and credible elections. Elections have become the measure in which the will of the people is respected. Fraudulent or manipulated elections exacerbate political instability within Member States.¹²⁵ Regular, free and fair elections have become essential tools for legitimacy and democracy consolidation in Member States.

This study is important because it speaks to the heart of human rights. Elections facilitate realization of all human rights namely; civil and political (first generation), social economic (second generation) and solidarity rights (third generation rights). Elections have become human rights events and are at the cornerstone of democracy.¹²⁶ Elections empower people to exercise their rights and to participate in the selection of their political representatives.¹²⁷ Through elections people have the right to participate freely in the government of their country, either directly or through freely chosen representatives under the provisions of the law¹²⁸ Through elections people have the right to take part in government, the right to vote¹²⁹ and to

¹²⁴ For example, this has been demonstrated in in post-electoral conflicts in Kenya (2007) and Côte d'Ivoire (2010).

¹²⁵ *Ibid* at 15.

¹²⁶ *Ibid* at 15.

¹²⁷ *Ibid* at 15.

¹²⁸ Art 13, African Charter on Human and People's Rights.

¹²⁹ The right to vote is also echoed in the Declaration on the granting of independence to Colonial Countries and Peoples.

be elected and the right to equal access to public service.¹³⁰ Failure to hand over power through democratic elections is detrimental to the continuation of democracy.¹³¹ Protection of democratic elections involves seeking to ensure that elections are conducted in accordance with internationally accepted standards. Secondly, it entails action to promote the development of standards for the protection of democratic elections among the RECs.

1.5 Research Methods

To achieve the aims and to answer the research questions of this research, the methodology employed in this study is purely qualitative. Data is obtained from primary and secondary sources. Therefore, the study is primarily based on a literature review of the primary and secondary sources relevant to the subject of discussion. The primary sources include international and regional human rights treaties. Other primary sources include relevant pieces of national legislation, regulations and case law. These will be consulted with a view to assess how the selected case studies and the role of RECs in regulating democratic elections, upholding legitimacy and credibility of elections. The study also heavily relies on secondary sources. These include, books, academic articles, and journals, research documents of international bodies such as the United Nations, journal articles, and case reports. These will provide important information on the topic. In addition, various internet sites will also be consulted for relevant information pertinent to the subject of discussion.

1.6 Limitations to the Study

The scope of the paper is limited in terms of volume. This means that the paper only discusses one form of Unconstitutional Changes of Government (UCGs) namely, ‘the refusal of incumbent governments to step down after losing an election’. This does not mean other forms not covered in this research are not relevant. The study is undertaken in South Africa and therefore most of the information is from literature reviews. There is significant reliance on secondary sources. The scope of the study is regionally focussed. This research is limited to two selected African countries namely, the Gambia and Zimbabwe.

¹³⁰ Centre for Human Rights *Professional Training Series No. 2, Human Rights and Elections. A Handbook on the Legal, Technical and Human Rights Aspects of Elections* (1994) at 4.

¹³¹R Gibbins, P D Webb & H Eulau ‘Election Political Science’ *Britannica*, available at <https://www.britannica.com/topic/election-political-science/Functions-of-elections>, accessed 10 June 2019.

The choice of the two countries for the case study is deliberate and strategic. Firstly, both countries have had election disputes. Secondly, The Republic of Gambia belongs to ECOWAS region and the Republic of Zimbabwe belongs to the SADC region. Therefore, the two countries are selected based on analysing the legal systems, the work and role of their respective regional economic communities. In addition, the selection of these two countries was premised on the need to analyse their legal systems regulating democratic elections and to identify the legal gaps within the RECs. The study therefore hopes that the conclusions and recommendations made in this study will be useful to the RECs that seek to embark on reform of their legislative framework and their enforcement mechanisms. Thus, the overarching aim of this thesis is to provide insights on the RECs in their efforts to uphold legitimate and credible electoral processes

1.7 Literature Review

There are several studies on the role of RECs in Africa.¹³² Important lessons can be drawn from these studies. These studies show that RECs work as subsidiary bodies of the African Union.¹³³ As subsidiary bodies, RECs have an obligation to cooperate with the African Union and the United Nations.¹³⁴ In their cooperation with the AU and UN, Pavhouse argues that RECs are key drivers of democratic transformation, fostering cooperation between countries.¹³⁵ They also influence the process of democratic consolidation'.¹³⁶ This study examines the role of RECs in upholding credible and legitimate electoral processes in Africa.

Zwanenburg conducted a study entitled, '*Regional Organisations and the Maintenance of International Peace and Security*.' The study argues that 'the role of 'RECs is primarily the maintenance of International Peace and Security'.¹³⁷ The study further critically analyses 'the regional peace operations'¹³⁸ of the AU and their legal basis. However, the study did not focus

¹³² See note 36.

¹³³ *Ibid.*

¹³⁴ L Nathan 'Will the Lowest be the First? Subsidiarity in Peace Making in Africa', University of Pretoria, 2016 pg 1. This paper was presented at the International Studies Association, Atlanta.

¹³⁵ International Institute for Democracy and Electoral Assistance, 'Regional Organizations', available at <https://www.idea.int/our-work/what-we-do/regional-organizations>, accessed 28 June 2019.

¹³⁶ J C Pavhouse 'With a Little Help from My Friends? Regional Organizations and the Consolidation of Democracy' (2002) 46 *American Journal of Political Science* pp. 611–626

¹³⁷ M Zwanenburg 'Regional Organisations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations' (2006) 11 *Journal of Conflict and Security Law* pp 483–508.

¹³⁸ These include African Union Mission in Sudan (AMIS), Economic Community of West African States in Cote d'Ivoire (ECOFORCE) and Economic and Monetary Community of Central Africa in the Central African Republic (FOMUC).

on democratic elections and their relation to international peace and security. This study aims to show that democratic elections are closely linked to international peace and security. A similar study by Borgen argued that ‘the role of regional organizations is primarily for ‘international peace and security’’.¹³⁹ However, the study also overlooked the importance of democratic elections in their relation to peace and security within RECs.

Nathan L, in his work *How and why African Mediators Compromise Democracy*, analyses and investigates the broad commitment of the AU and the sub-regional organizations to democracy.¹⁴⁰ Nathan argues that the organizations have often compromised democracy, condoned undemocratic power-sharing arrangements, endorsed undemocratic elections, annulled democratic elections, accepted the overthrow of elected governments; and legitimized coup leaders.¹⁴¹ In his study, Nathan shows the weakness and inefficiencies among the RECs in upholding democratic values. On democratic elections, Nathan analyses the case of SADC region. In this case, an electoral dispute arose in Zimbabwe as a result of the 2008 presidential elections. SADC appointed a mediator for Zimbabwe. The mediator, former South Africa’s President, Thabo Mbeki, endorsed the undemocratic election.¹⁴² Thus, resulting in the failure of the region in delivering its mandate for respect, promotion and protection of electoral democracy as stipulated in its founding documents.

Christof, in his work *ECOWAS and the Restoration of Democracy in The Gambia* examines particularly ‘the role played by the ECOWAS in resolving electoral disputes in the Gambia’.¹⁴³ This study shows the importance of RECs in election management. Following the disputed December 2016 presidential elections in the Gambia,¹⁴⁴ Christof argues that ‘ECOWAS managed to “restore democracy” in the country by using the threat of force, but without any use of direct physical violence.’¹⁴⁵ In addition, according to the author, both the African Union and the United Nations Security Council backed ECOWAS, which also gave the latter

¹³⁹ Borgen, Christopher J *The Theory and Practice of Regional Organization Intervention in Civil Wars* (1994) at 124.

¹⁴⁰ Nathan L (2016). *How and Why African Mediators Compromise Democracy*, University of Pretoria, Prepared for the International Conference on Mediation at 1.

¹⁴¹ *Ibid at 1.*

¹⁴² *Ibid at 5.*

¹⁴³ H Christof. ‘ECOWAS and the Restoration of Democracy in the Gambia’ (2017) *Africa Spectrum* 52. The ECOWAS region has managed on several occasions to restore peace and constitutional order within its Member States. In 2016 ECOWAS deployed troops to restore constitutional order in the Gambia after the incumbent president had refused to step down.

¹⁴⁴ *Ibid at 85.*

¹⁴⁵ *Ibid at 85.*

legitimacy in carrying out the mandate.¹⁴⁶ The study makes a good starting point on the role of RECs in upholding legitimate electoral processes in Africa. Therefore, in this study, the ECOWAS will be used as a good comparable case study on the role of RECs in upholding credibility and legitimacy of electoral processes.

Ola and Babalola in their work, *Missions with Hindrance: African Union and Peacekeeping Operations*, provide a detailed analysis on the role of RECs in conflict management.¹⁴⁷ However, the article does not get into any detail regarding the electoral processes and their effect on democracy. This study fills the gap and explains the implications of electoral disputes on democracy.

Cordenillo and Ellis in their analysis of the RECs argue that ‘election-related initiatives by regional organizations vary enormously across regions’.¹⁴⁸ Their initiatives vary according to contexts, historical, political and economic situations in which regional organizations operate. These determine the RECs mandates to act in the field of elections.¹⁴⁹ Despite the above differences, this study argues that regional organizations can play an important role in promoting and protecting the integrity of democratic elections. Some regional organizations such as SADC, have clear guidelines on election observation and assistance.¹⁵⁰ They play a critical role in promoting and protecting the integrity of these elections.¹⁵¹ Cordenillo and Ellis further argue that the initiatives of RECs range from Election Observation to technical assistance at the national and local levels, in line with their respective mandates and the legitimacy that they draw from their member states.¹⁵² RECs are also responsible with fostering election related dialogues among states.¹⁵³ They serve as a platform for the discussion of various transnational economic, political and social issues.¹⁵⁴ Although this study is broad, it recognises the importance of RECs on election related dialogues. The result is cooperation among states in conducting democratic elections, hence the objectives of this study.

¹⁴⁶ *Ibid* at 85.

¹⁴⁷ A Adegboyega & O A Babalola ‘Missions with Hindrance: African Union (AU) and Peacekeeping Operations’ (2016) 5 *Journal of African Union Studies* at pp 113-135.

¹⁴⁸ R Cordenillo & A Ellis *The Integrity of Elections: The Role of Regional Organizations Stockholm* (2012)

¹⁴⁹ *Ibid*.

¹⁵⁰ For example, the AU adopted the African Charter on Democracy, Elections and Governance. SADC adopted its guidelines on Elections.

¹⁵¹ Cordenillo R, Ellis op cit note 148 at 5.

¹⁵² *Ibid* at 5.

¹⁵³ *Ibid* at 15.

¹⁵⁴ *Ibid* at 15.

The study from UNDP's Maendeleo Policy Forum examines the role of RECs on democratic elections. The study shows that within the RECS 'regional leaders under regional integration arrangements are taking a more active role in ensuring peaceful leadership transitions. For instance, the African Union, the East African Community (EAC) and the Economic Community of West African States (ECOWAS) have led mediation efforts to resolve political crises following elections.¹⁵⁵ This study seeks to draw possible lessons from comparing the SADC and ECOWAS regions on how they have been effective in carrying out their mandates.

Nguyen evaluates the responsibility of RECs and sets some criteria on their role in conflict management, including electoral disputes. Nguyen argues that RECs must meet 'four conditions to play an active and effective role in conflict management. These conditions are legitimacy, enforcement, resources and cooperation with the UN and other bodies.¹⁵⁶ A lesson drawn from Nguyen's argument is the importance of the principle of subsidiarity among RECs and the higher bodies.

Sisk and Reynolds in the book, *Elections and conflict management in Africa* show the exact nature of electoral related conflict in Africa. The book gives a deeper and comprehensive understanding on the nature of elections, their limitations and how they can be used to stop conflict within member states.¹⁵⁷ However, the book seems not to focus on the role of RECs on elections and conflict management. Goodwin-Gill GS in the book, *Free and fair elections* discuss the concept of free and fair elections. The author shows global developments leading to the establishment of international best practices on electoral democracy. However, this study does not adequately focus on the role of RECs as instruments for the realization of electoral democracy.¹⁵⁸

The study conducted by Tikikel Alemu entitled, *The African Charter on Democracy, Elections and Governance : A Normative Framework for Analysing Electoral Democracy in Africa*,¹⁵⁹ provides a deep analysis of how the new ACDEG can be used to promote legitimate and credible elections in Africa.¹⁶⁰ However, little reference is given to the RECs. This study

¹⁵⁵ Maendeleo Policy Forum 'Deepening Democracy, Election Management and Stability in Africa's Divided Societies' 6 ed (2016) at 19

¹⁵⁶ T Nguyen 'Beyond Good Offices? The Role of Regional Organizations in Conflict Resolution' (2002) 55 *Journal of International Affairs* at 463–484.

¹⁵⁷ T D Sisk & A Reynolds *Elections and Conflict Management in Africa* Washington (1998).

¹⁵⁸ GS Goodwin-Gill *Free and Fair Elections- Guide to US elections* 5 ed (2005).

¹⁵⁹ T Alemu *The African Charter on Democracy, Elections and Governance: A Normative Framework for Analysing Electoral Democracy in Africa* Unpublished LLM Dissertation, University of Pretoria (2007).

¹⁶⁰ *Ibid.*

follows work by Musarurwa, entitled *Creating Sustainable Democracy in Africa: An African Supranational Body for The Effective Supervision of Elections in Africa* that ‘Africa needs to go a step further by establishing a supervisory body for elections that will fulfil the aspirations in the ACDEG’.¹⁶¹

Various institutions have done extensive studies on RECs in international peace and security. Several articles on ECOWAS and the SADC regions are also available on internet and newspapers but are more based on facts than legal analysis. However, the role of RECs on democratic elections has not been adequately explored. A comparison of the ECOWAS and SADC region will shed light and help fulfil the aims and answer questions of this study. This study seeks to draw possible lessons on the role of RECs in upholding credible and legitimate electoral processes.

To conclude, it can be said that the above review shows that RECs are drivers of democratic processes in Africa. Some RECs within Africa have already started making progress in promoting and enforcing democratic values within their regions.¹⁶² Contested electoral processes impact democracy negatively especially in circumstances where elections are not credible, and legitimacy is at stake. Contested elections may potentially cause civil wars, gross violations of human rights and in some cases political instability. Elections should meet international and regional standards and ought to be conducted according to the law. The ECOWAS is a good example of a REC that has done respectable work in upholding democracy. The mandate of RECs varies from conflict prevention to mediation, international peace, security and democratic elections among others. This research focuses on the role of RECs in upholding credible and legitimate electoral processes.

1.8 Overview of the Chapters

In this study, Chapter One sets out the content of the research, identifies the research problem and outlines the methodology of the study. Chapter Two discusses the regional and normative framework governing democratic elections in Africa. Chapter Three discusses the case studies namely, the Gambia and Zimbabwe. The Chapter discusses the notion of state responsibility and state obligations of democratic elections. Under Chapter Three a comparison is drawn between the ECOWAS and SADC’s reactions to election disputes. Chapter Four analyses the

¹⁶¹ T TG Musarurwa *Creating Sustainable Democracy in Africa - An African Supranational Body for The Effective Supervision of Elections in Africa* Unpublished LLM Dissertation, University of Pretoria (2008).

¹⁶² The ECOWAS is a good example as demonstrated in this study.

extent to which the RECs have supported Member States compliance with international and regional standards on democratic elections. The Chapter also looks at the role of RECs in building strong democratic institutions in Africa. Chapter Five draws conclusions and recommendations.

CHAPTER TWO: REGIONAL REGIME GOVERNING DEMOCRATIC ELECTIONS IN AFRICA

2.1 Introduction

This Chapter examines the normative framework that governs and regulates the conduct of democratic elections within the African Union.¹⁶³ Under this framework, the role of Regional Economic Communities particularly on the conduct of democratic elections in Africa is discussed. This legal framework stipulates regional and international standards of democratic elections in Africa. These standards are measured and determined by this framework. More so, this framework does not only protect and promote democratic elections but also fosters stability and security in the continent.¹⁶⁴ This Chapter considers the African Charter on Democracy, Elections and Governance (ACDEG) as the most authoritative instrument of the AU regulating democratic elections. The ACDEG also stipulates the standards upon which elections are measured and tested for credibility and legitimacy in Africa.

While the ACDEG is the most comprehensive binding instrument of the AU on democratic governance including elections, most state parties have not complied with the Charter¹⁶⁵ and other legal instruments regulating democracy and democratic elections.¹⁶⁶ Some of the binding instruments of the AU related to electoral democracy include the Constitutive Act of the AU¹⁶⁷ and the Protocol to the Peace and Security Council. In the past, the Peace and Security Council (PSC) has suspended Member States that have breached the norms and standards that are encapsulated in the ACDEG. Examples will be illustrated below in the Chapter.

Non-binding instruments discussed in this chapter include: the Declaration Governing Democratic Elections in Africa, which forms part of the guidelines for democratic elections in

¹⁶³ These include but not limited to; the Constitutive Act of the AU; the African Charter on Democracy, Elections and Governance; the Protocol to the establishment of the Peace and Security Council; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights; the Declaration on Principles Governing Democratic Elections in Africa and the Ezulwini Framework to mention a few.

¹⁶⁴ T TG Musarurwa op cit note 161 at 19.

¹⁶⁵ According to PSC report, by august 2018 only Togo had submitted a report on compliance to the ACDEG since it had entered into force in February 2012. By 2018, the Charter had been signed by 46 member states and ratified by 31 which is a slow progress unlike other AU instruments

¹⁶⁶ The Report from the Institute of Security Studies (2018) shows that African states have not been in compliance of democratic principles including electoral democracy. See, Institute of Security Studies 'Is the African Charter on Democracy Strong Enough?' available at <https://issafrica.org/pscreport/psc-insights/is-the-african-charter-on-democracy-strong-enough>, accessed 5 June 2019.

¹⁶⁷ The Constitutive Act is the Founding Document of the African Union. The Act was adopted in Lomé, Togo on 11 July 2000 and entered into force on 26 May 2001.

Africa. These instruments are discussed in relation to their effect, significance and impact on democratic elections in Africa. The study highlights gaps within these instruments as well. Lessons are also drawn on the enforcement of this legal framework. Internationally, several United Nations treaties put obligations on Member States to guarantee the right to vote through democratic elections. These treaties include the core documents which make up the international bill of human rights, which include the human rights provisions of the UN Charter, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2.2 Constitutive Act of the AU (2001)

The Constitutive Act of the AU is the foundational legal document of the AU. The Act solemnises the declaration by Africa's leaders to uphold the ideals of the founding fathers of the OAU and AU. It also honours generations of Pan-Africanists on the continent and the diaspora to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States.¹⁶⁸ The Act was adopted at the transformation of the OAU into the African Union.¹⁶⁹ In addition, it was adopted as a result of the strong and genuine desire to 'create a better world' in which democracy would be developed and respected. The Constitutive Act sets out the codified framework under which the African Union is to conduct itself.¹⁷⁰ As of 2019, all the 55 African states are signatories to the Constitutive Act.¹⁷¹

The founding objectives and principles of the AU are outlined in article 3 and article 4 of the Constitutive Act. These include consolidation of democratic institutions and culture, good governance and the rule of law, promotion and protection of human rights,¹⁷² the promotion of democratic principles and institutions, and popular participation.¹⁷³ The Constitutive Act

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ When a state ratifies the Constitutive Act it formally becomes a member of the AU.

¹⁷¹ See the 'The Africa Governance Report-African Union', available at https://au.int/sites/default/files/documents/36418-doc-eng-_the_africa_governance_report_2019_final-1.pdf, accessed 4 July 2019. Morocco recently re-joined the AU.

¹⁷² Article 3 and 4 of the Constitutive Act.

¹⁷³ *Ibid.*, Article 3(g) and (h) and 4 (m).

further condemns and rejects unconstitutional changes of governments.¹⁷⁴ Thus, providing a normative direction to guide the continent on democratic consolidation.¹⁷⁵

The Constitutive Act represents greater commitments by Member States to promotion and protection of human rights than its predecessor, the Charter of the Organization of African Unity (OAU Charter).¹⁷⁶ The Act is thus an ambitious document because three of its fourteen objectives and six of its sixteen guiding principles focus on human rights.¹⁷⁷ Although these objectives and principles focus on human rights, none of them address democratic elections explicitly. It has been argued that, “apart from laying the basis for democratic values which allow for the holding of free and fair elections, the Act falls short of addressing the electoral problems of the continent.”¹⁷⁸ Nevertheless, the Act provides significantly for the institutional avenue through which efforts to ensure free and fair elections would be realised.¹⁷⁹ Although democratic elections were not explicitly addressed, the Act gives, serious commitment to previous international human rights instruments.¹⁸⁰

Furthermore, the Act is not indifferent. In cases of grave violations of human rights, the amended Constitutive Act provides for the “right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide and crimes against humanity.”¹⁸¹

The Constitutive Act also offers “possibilities to ensure conformity with the norms set out in the Act,”¹⁸² and that “unlike the UN Charter, the Act does not provide for expulsion of a Member State that persistently violates the principles, including the human rights principles, set out in the Act.”¹⁸³ However Governments that come into power unconstitutionally may be suspended by the Union.¹⁸⁴ Under this provision, the African Union in 2019 suspended Sudan

¹⁷⁴ *Ibid*, Art 4(p).

¹⁷⁵ L A Rahman *West Africa in Context: Elections and the Challenges of Democratic Governance: Editorial* (2011).

¹⁷⁶ J M Isanga, ‘The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?’ (2013) 11 *Santa Clara J. Int’L Law* 270.

¹⁷⁷ *Ibid*.

¹⁷⁸ T Alemu ‘The African Charter on Democracy, Elections and Governance: A Normative Framework for Analysing Electoral Democracy in Africa’, Unpublished LLM Dissertation University of Pretoria (2007).

¹⁷⁹ *Ibid*.

¹⁸⁰ These includes the Declaration of Human Rights and the African Charter on Human and peoples’ Rights.

¹⁸¹ Protocol on Amendments to the Constitutive Act of the African Union, 11 July 2003.

¹⁸² F Viljoen & E Baimu ‘Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples’ Rights and the African Court of Justice’ (2004) 22 *NETH. Q. HUM. RTS* at 241-245.

¹⁸³ *Ibid* at 249.

¹⁸⁴ Art 30 Constitutive Act. Under this Act, most recently (2019) the African Union has suspended Sudan for failures of smooth transfer of power and political instability after the fall of the former president.

from all AU activities following continued violent attacks on civilians and the refusal by military government to hand over power to civilians and proposed reforms including electoral reforms.¹⁸⁵

In addition, following the disputed December 2016 presidential elections in the Gambia, both the African Union and the United Nations Security Council backed ECOWAS, in refusal to recognise Jammeh as the legitimate President of Gambia. Jammeh had initially conceded defeat to elections and later changed his mind and refused the outcome of the elections.¹⁸⁶ On the role of RECs, the Constitutive Act article 3(I) also make provisions for the smooth coordination between the RECs and the AU.¹⁸⁷ Article 3(I) reads to ‘coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union’.¹⁸⁸

The AU’s commitment has been tested in a few areas such as its response to the disputed elections in Zimbabwe¹⁸⁹ and Kenya,¹⁹⁰ as well as its response to situations of grave violations of human rights such as in Darfur, Sudan and Libya. It has been noted that “violations of human rights, constitutionalism, and democracy in Zimbabwe and other African countries were not met by African leaders with the same condemnation and rejection as they did [in] Togo,” Guinea-Bissau, and Mali.¹⁹¹ Thus, the Constitutive Act as a founding document of the AU feeds to the concept of free and fair elections although not enumerating on the concept.¹⁹²

2.3 African Charter on Democracy, Elections, and Governance

The 2007 African Charter on Democracy, Elections and Governance is the most authoritative and comprehensive regional legal treaty of the AU relating to democracy, elections and

¹⁸⁵ The Guardian ‘African Union suspends Sudan over violence against protesters, Expulsion heaps pressure on military rulers to establish civilian-led transitional authority’ (6 Jun 2019). Available at: <https://www.theguardian.com/world/2019/jun/06/sudan-african-union-suspension-military-rulers>, accessed 4 July 2019.

¹⁸⁶ H Christof ‘ECOWAS and the Restoration of Democracy in the Gambia, in *Africa Spectrum*’ (2017) at 1, 52 & 85–99.

¹⁸⁷ Art 3(I) Constitutive Act of the AU.

¹⁸⁸ *Ibid.*

¹⁸⁹ K Volla ‘The Elections on 29 March and the Later Runoff Event and by-Elections on 27 June 2008’, available at <https://www.jus.uio.no/smr/english/about/programmes/nordem/publications/2008/0808.pdf>, accessed 2 July 2019.

¹⁹⁰ H Mohamed, ‘Why are Kenya's Elections so bitterly contested? Opposition leader rejects presidential poll results alleging fraud, as yet another election in Kenya runs into trouble’ 2017. Available at <https://www.aljazeera.com/blogs/africa/2017/08/kenya-elections-bitterly-contested-170810154141394.html>, accessed 29 May 2019.

¹⁹¹ Isanga op cit note 175.

¹⁹² T TG Musarurwa op cit note 140 at 19.

governance.¹⁹³ As of 28 June 2019, the Charter had been signed by 46 out of 55 countries of the AU and 34 states had ratified.¹⁹⁴ This is the only treaty with binding obligations explicit to democratic elections in chapter 7 of the Charter.¹⁹⁵ The ACDEG is anchored in the Constitutive Act of the African Union. The Act commits the AU Member States to participatory democracy, constitutionalism, rule of law, human rights, peace and security and good governance.¹⁹⁶

The ACDEG arose out of a concern, among other matters, that unconstitutional changes of government had become “one of the essential causes of insecurity, instability and violent conflict in Africa”.¹⁹⁷ Therefore, the Charter underlines the determination of the Member States to promote and strengthen good governance, by deepening and consolidating the rule of law and entrenching a political culture of change of power based on the holding of regular, free, fair and transparent elections.¹⁹⁸ The Africa Governance Report provides:

By this Charter, the Member States committed themselves to the following objectives: promoting adherence to democracy and respect for human rights; promoting and enhancing adherence to the rule of law; promoting the holding of regular free and fair elections; prohibiting, rejecting and condemning unconstitutional changes of government in Member States; promoting the fight against corruption; promoting citizen participation in governance and accountability in the management of public affairs; promoting gender balance and equality; promoting best practices in the management of elections; and, enhancing cooperation between the AU, RECs, state parties and the international community on democracy, elections and governance.¹⁹⁹

Thus, the Charter is a consolidation of earlier commitments through various declarations and decisions of the O/AU ²⁰⁰ to ensure the success of the democratisation process on the

¹⁹³ The African Charter on Democracy, Elections, and Governance, adopted in Addis Ababa, Ethiopia 2007 and entered into force on 15 February 2012.

¹⁹⁴ *Ibid.*

¹⁹⁵ Art 17- 22 of the African Charter deals with democratic elections in detail.

¹⁹⁶ Art 3 and 4 of the AU Constitutive Act.

¹⁹⁷ The Africa governance Report- op cit note 165.

¹⁹⁸ *Ibid* pg. 31

¹⁹⁹ *Ibid*, pg. 31.

²⁰⁰ These include: the 1990 Declaration on the political and socio-economic situation in Africa and the fundamental changes taking place in the world, the 1995 Cairo Agenda for the Re-launch of Africa's Economic and Social Development, the 1999 Algiers Declaration on Unconstitutional Changes of Government, the 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government, the 2002 OAU/AU Declaration on Principles Governing Democratic Elections in Africa, the 2003 Protocol Relating to the Establishment of the Peace and Security Council of the African Union);

continent.²⁰¹ The roots of electoral democracy in the Charter can be traced to the Universal Declaration of Human Rights (UDHR). Article 21 (3) states that ‘the will of the people shall be the basis of the authority of government, this will shall be expressed in periodic and genuine elections which shall be, by universal and equal suffrage, held by secret vote or by equivalent free voting procedures’.²⁰² Several human rights instruments such as the ICCPR²⁰³, and the African Charter²⁰⁴ have reinforced the idea of democratic elections.

The ACDEG has provisions for sanctions to states that do not comply with its standards as stipulated by the AU. Article 23 provides for sanctions in cases of unconstitutional change of governments. For example, there may be sanctions for refusal by an incumbent government to relinquish power to the winning party or candidate after free and fair and regular elections.²⁰⁵ Under this provision the AU suspended Ivory Coast between December 2010 and April 2011. Ivory Coast was suspended but the incumbent regime declined to hand over power after its defeat in the election.²⁰⁶ These provisions complement the AU sanctions regime found in other instruments such as the Constitutive Act of the AU.²⁰⁷ In this regard, a breach of the ACDEG could invite sanctions in terms of article 46 of the Charter itself,²⁰⁸ and article 23(2) and 30²⁰⁹ of the AU Constitutive Act.²¹⁰

Largely, the ACDEG provides a framework of norms and principles, the strict observance of which would significantly reduce the risk of unconstitutional changes of governments, popular uprisings and conflicts arising from competition for political power on the continent.²¹¹ The ACDEG is, therefore, the hard law and binding regional instrument, explicitly regulating

²⁰¹Report on the Meeting of the Independent Experts on the Draft Charter on Democracy, Elections and Governance, Addis Ababa, Ethiopia, 21-23 November 2005.

²⁰² Art 21 (3) of the Universal Declaration of Human Rights, 1948. The Universal Declaration of Human Rights (UDHR) is a historic document that was adopted by the United Nations General Assembly at its third session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France. See also Art 25 of the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976. See also Art 25 of the African Charter on Human and Peoples Rights, Adopted in Nairobi June 27, 1981. Entered into Force October 21, 1986.

²⁰³ Art 25 of the ICCPR.

²⁰⁴ Art 13 of African Charter.

²⁰⁵ Art 23 (4) ACDEG.

²⁰⁶ S Joshua & F Olanrewaju ‘The AU’s Progress and Achievements in the Realm of Peace and Security’ (2017) 73(4) *India Quarterly* at 454–471

²⁰⁷ Art 30 of the Constitutive Act of the AU.

²⁰⁸ Art 46 of the ACDEG provides that “the Assembly and the Peace and Security Council shall determine the appropriate measures to be imposed on any State Party that violates this Charter”.

²⁰⁹ Art article 23(2) & 30 of the ACDEG. Art 30 stipulates that “Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union”.

²¹⁰ *Ibid.*

²¹¹ Art 23 of the ACDEG strongly prohibit unconstitutional change of governments.

elections in Africa.²¹² Most recently, the African Union has cited the ACDEG in its statement to suspend Sudan.²¹³

Hansungule argues that "there is a paradox by African Leaders who bind themselves to international human rights instruments to prevent being bound."²¹⁴ This means that by signing international agreements, a country can remove international focus upon it as not being a signatory.²¹⁵ Musarurwa argues that although it is essential to have firm hard law instruments regulating democratic elections with specificity, the failure to hold free and fair elections has little to do with laws.²¹⁶ Failure to comply with international standards has been emphasized and re-emphasized in various human rights reports.²¹⁷ Some scholars have also highlighted the lack of compliance with the Charter.²¹⁸ Non-compliance is attributable not only to the weak African States but to the lack of enforcement within the AU and regional organizations.²¹⁹ Therefore, enforcement mechanisms are essential for regulating the smooth transfer of power.

The ACDEG has been utilised by the Regional Economic Communities of the African Union in adopting their legal instruments for the protection of democratic elections. For example, SADC's Principles and Guidelines for Democratic Elections,²²⁰ and the ECOWAS Protocol on Democracy and Good Governance contain provisions aligned with the Charter.²²¹

2.4 The Protocol Establishing the Peace and Security Council (2002/2003)

The Protocol Establishing the Peace and Security Council²²² was adopted pursuant to article 5(2) of the AU Constitutive Act. As of 15 December 2017, the Protocol had been signed by 53 states out of 55 of the AU and ratified by 52 states.²²³ Its main objectives are articulated in

²¹² T T G Musarurwa op cite note 161 at 24

²¹³ Eyewitness News 'African Union Suspends Sudan', available at <https://ewn.co.za/2019/06/06/african-union-suspends-sudan>, accessed 5 July 2019.

²¹⁴ T T G Musarurwa op cit note 161 at 24).

²¹⁵ *Ibid* at 24.

²¹⁶ *Ibid* at 24.

²¹⁷ *Ibid* at 24.

²¹⁸ *Ibid* at 24.

²¹⁹ *Ibid* at 24.

²²⁰ SADC Principles and Guidelines Governing Democratic Elections, Revised, 2015.

²²¹ The ECOWAS Protocol on Democracy and Good Governance was adopted in December 2001 by the Heads of State and Government as supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (1999).

²²² The Protocol was adopted by the AU Assembly in Durban, South Africa on 10 July 2002, in terms of article 5 (2) of the Constitutive Act of the AU and entered into force on 26 December 2003.

²²³ Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted by the African Union in 2002 and entered into force on 26 December 2003.

article 3 of the Protocol. The objectives are peace and security, stability, conflict resolution, peace building, promotion of democratic practices, good governance and human rights.²²⁴

Article 4 of the Protocol outlines its key principles.²²⁵ This includes 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with article 4(h) of the Constitutive Act.' However, the Protocol does not have explicit provisions for democratic elections.

Article 7 (g) of the Protocol to the PSC provides that the Peace and Security Council shall 'institute sanctions whenever an unconstitutional change of Government takes place in a Member State.'²²⁶ For example, Eritrea was suspended between April 2009 and January 2011 due to its support of insurgents in Somalia. Between December 2010 and April 2011, Ivory Coast was suspended, but the incumbent regime declined to hand over power after its defeat in the election.²²⁷ UN-France-AU force, however, forced the incumbent regime to step down and de jure government assumed office.²²⁸ Togo was also suspended between February and May 2005 and the Comoros when Mohamed Taki Abdoukarim died in office and his son fraudulently retained power by manipulating the election and proceeding to win another election in 2010.²²⁹ In Madagascar, Guinea and Niger, the PSC declared some persons in the military junta unqualified to contest in some elections.²³⁰

More so, there are cases when presidents of some significant African states such as Uganda and Algeria abolished the stipulated presidential terms in their constitution and held on to power through the manipulation of election results. In such cases, the AU-PSC lacked the capability to enforce sanctions against such elements for change.²³¹ The AU has sent observers to monitor elections in several African countries such as Sudan and Somalia. The PSC has resolved post-election violence in Kenya and Cote d'Ivoire.²³² The PSC, since its first meeting

²²⁴ Art 3 of the PSC.

²²⁵ Art 4 of the PSC.

²²⁶ Art 7 of the PSC.

²²⁷ E Y Omorogbe 'A Club of Incumbents? The African Union and Coups d'état.' (2008) 44(1) *Vanderbilt Journal of Transnational Law* at 123–154.

²²⁸ P D Williams 'The African Union's Conflict Management Capabilities' (Working Paper) 2011 *International Institution and Global Governance Program, New York*.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ E Y Omorogbe 'A Club of Incumbents? The African Union and Coups d'état.' (2008) 44(1) *Vanderbilt Journal of Transnational Law* at 123–154.

²³² S Joshua & F Olanrewaju op cit note 185.

in 2004, has deployed AU missions to conflict zones,²³³ for instance, the Comoros, Burundi (2003–2004), Sudan, Darfur (2004–2007), Democratic Republic of Congo, Cote d’Ivoire and Somalia.²³⁴

The PSC has been able to ensure that forceful military and unconstitutional government take-overs are reverted to democratic rule for better democratic consolidation and good governance in Africa. Some of the cases where this has been done include Guinea and Mauritania in 2008, Madagascar in March 2009 and Burkina Faso in 2015. Offending Member States were also suspended from the AU. They were given about 6 months to conform to its constitution. When positive changes are not recorded, due to the obstinate attitude of some states, the PSC has had to engage more coercive means of sanction regimes to ensure compliance. Sanctions, such as travel bans and freezing of regime assets, have been imposed on the individuals tagged as conflict instigators.²³⁵ The sanctions are to cause a change for positive political behaviours and be a substitute for armed conflict and stigmatise the target.

The AU PSC has also managed negotiations and talks within states to facilitate power sharing agreements especially in conflicts resulting from election disputes. Cases where AU had monitored power-sharing arrangements include Sudan, Ivory Coast, Chad and Zimbabwe (2008–2009), Libya and Liberia (1994–2003), Côte d’Ivoire (2002–2007) and Central African Republic (1996–2007)²³⁶

2.5 African Union Declaration on the Principles Governing Democratic Elections in Africa, (2002)

On the management of elections, state parties must adhere to the AU Declaration on the Principles Governing Elections in Africa of 2002 (Declaration on Elections). The Declaration seeks to strengthen the role of the Union in observing elections and advancing the democratization process.²³⁷ It also is comprehensive on elections and sets out guidelines for elections. The Declaration is more elaborate than the previous AU instruments governing

²³³ T Murithi ‘Proactive interventionism: The African Union, Peace and Security Councils engagement in the Horn of Africa’ (2012) 12(12) *Journal of Conflict Resolution* at 87–111.

²³⁴ *Ibid.*

²³⁵ For example, in 2002 and 2003, the United States and the European Union imposed targeted measures on the Government of Zimbabwe, including financial and visa sanctions against selected individuals, such as President Mugabe, his wife and his cabinet. They also introduced a ban on transfers of defence items and services, and a suspension of non-humanitarian government-to-government assistance.

²³⁶ A Mehler ‘Not Always in the People’s Interest: Power-Sharing Arrangements in African Peace Agreements (2012) 83 *GIGA Working Papers*.

²³⁷ The Africa governance Report- op cit note 175.

democratic elections in Africa because the former sets out a benchmark as to what constitutes free and fair elections.²³⁸

Article II of the Declaration outlines principles of democratic elections.²³⁹ These principles include democratic constitutions with supportive legal documents, the doctrine of separation of powers, regular elections and impartial, competent, accountable electoral institutions that are ‘staffed by well-trained personnel and equipped with adequate logistics. The declaration also sets out the duties of states and the rights and obligations of citizens.’²⁴⁰

However, the Declaration is a soft law instrument although it carries specificity in regulating democratic elections. ‘Soft laws are not binding on Member States’.²⁴¹ Compared to previous commitments, the Declaration provides for more clear and specific guidelines as to what constitutes free and fair elections.²⁴² Its status as soft law and legally non-binding instrument leave it as a mere statement of common aspiration.²⁴³ Besides, it does not address cases of non-compliance with the principles or how they should be handled.²⁴⁴

Akin to the provisions of the Declaration are the provisions of the New Partnership for Africa’s Development (NEPAD). Art 7 of NEPAD undertakes to enforce with ‘renewed determination’ the ‘inalienable right of the individual to participate through free, credible, and democratic political processes in periodically electing their leaders for a fixed term of office.’²⁴⁵ The Ezulwini framework was also adopted to enhance democracy and prohibit unconstitutional changes of Government in Africa.²⁴⁶ The framework is also a soft law. It focussed on addressing unconstitutional change of governments and coups. Hence, it did not address the democratic elections.

²³⁸ T T G Musarurwa op cit note 161 at 23.

²³⁹ Art 2, African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002.

²⁴⁰ *Ibid.*

²⁴¹ T Alemu op cit note 2 at 19.

²⁴² *Ibid* at 21.

²⁴³ *Ibid* at 21.

²⁴⁴ *Ibid* at 21.

²⁴⁵ Art 7, The New Partnership for Africa's Development (NEPAD) is an economic development program of the African Union. NEPAD was adopted at the 37th session of the Assembly of Heads of State and Government in July 2001 in Lusaka, Zambia. NEPAD aims to provide an overarching vision and policy framework for accelerating economic co-operation and integration among African countries.

²⁴⁶ The Framework affirmed previous human rights instruments such as the Lomé Declaration, and reinforced other provisions in the AU Constitutive Act and the PSC Protocol, in elaborating an institutional framework to address the phenomenon of unconstitutional changes of Government.

2.6 Conclusion

This chapter examined the legal framework governing democratic elections in Africa. These include the Constitutive Act, the ACDEG, the Protocol establishing the Peace and Security Council and the Declaration Governing Democratic Elections in Africa. The key lessons drawn in this chapter are that there are enough legal norms governing democratic elections in Africa. It is, therefore, important for states to comply with regional and international obligations on democratic elections. Secondly, democratic elections are fundamental elements of human rights facilitating the realisation of other rights. Consequently, elections must be conducted in accordance with the law. For that reason, the chapter assessed the role of regional organisations in resolving electoral disputes, upholding legitimacy and credibility of electoral processes in Africa.

CHAPTER THREE: CONTESTED ELECTIONS IN THE REPUBLIC OF THE GAMBIA AND ZIMBABWE

3.1 Introduction

The previous Chapter (2) discussed and examined the regional framework governing democratic elections in Africa.²⁴⁷ The framework put obligations on states to uphold credible and legitimate electoral processes.²⁴⁸ Under this framework, states have an obligation to comply with the provisions of the conventions or treaties they have signed and ratified.²⁴⁹ As a sign of compliance with the treaty bodies, states are obliged to respect international law and their domestic laws that comply with the treaty bodies.²⁵⁰ Regular reporting to treaty bodies is also a sign of commitment to uphold human rights. In practice however, commitment to human rights remains a challenge. This chapter discusses this challenge using the case of the Gambia and Zimbabwe's disputed elections. These case studies show that the AU Member States have not complied and respected the regional framework on democratic elections.

Furthermore, this chapter argues that, although electoral malpractices have been caused by incumbent governments, elections were contested for many years in the Gambia and Zimbabwe not only because of electoral malpractice by incumbent governments, but because opposition parties failed to prepare adequately legally and politically to avoid and prevent electoral malpractices by incumbent governments in these states. Thus, these states had weak opposition parties and these parties were not free of blame for the cycle of rigged elections.

²⁴⁷ The main regional documents governing democratic elections in Africa discussed in the previous chapter include but not limited to; the Constitutive Act of the AU; the African Charter on Democracy, Elections and Governance; the Protocol Establishing Peace and Security Council, and the Declaration Governing Democratic Elections in Africa.

²⁴⁸ For instance, the African Charter on Democracy Elections and Governance provides for binding obligations on states to respect democratic elections.

²⁴⁹ As developed by State practice or treaty bodies, these obligations are often detailed and comprehensive. The United Nations Human Rights Committee (HRC) and other treaty bodies routinely interpret these provisions, thereby helping to further develop consensus on the meaning of a relevant norm. Views on individual petitions and General Comments of the HRC provide an authoritative understanding of the obligations States have undertaken to respect democratic governance and genuine elections.

²⁵⁰ Since the beginning of the 21st century several African countries have gone to the polls, however, most of these elections were highly contested.

Finally, this chapter illustrates the role and the responses of the Regional Economic Communities on democratic elections. The Chapter analyses and examines the disputed elections in the Gambia (2016), and Zimbabwe (2018). These countries are chosen because they both share similar histories of election disputes. Both countries belong to two different RECs, therefore, comparing the role played by the ECOWAS and SADC regions enriches the objectives of this study. Comparable examples will also be drawn to show the differences in how the RECs reacted in response to the election disputes. The response of the RECs largely determines the role they have played to uphold credible and legitimate elections in Africa. The Chapter is divided into two parts: the first examines the election dispute in the Gambia in 2016, the second looks at the election dispute in Zimbabwe in 2018. In addition, the responses of both RECs to these elections are analyzed. Finally, the chapter concludes by showing that the Gambia and Zimbabwe did not comply with regional obligations on democratic elections.

3.2 The Gambia Election Dispute (2016)

3.2.1 Introduction and Legislative Framework

The Republic of the Gambia is a member of the United Nations²⁵¹ and the African Union.²⁵² The Gambia has signed and ratified many international and regional human rights instruments adopted by the United Nations and the African Union including those on democratic elections. The country has made binding international commitments to adhere to the human rights standards stipulated in these universal human rights documents.²⁵³ Regionally, the Gambia is a member of the Economic Community of West African States since 1975.²⁵⁴ The ECOWAS was initially formed to promote economic cooperation and integration in West Africa.²⁵⁵

²⁵¹ Claiming Human Rights, 'Guide to International Procedures Available in Cases of Human Rights Violations in Africa', available at <http://www.claiminghumanrights.org/gambia.html>, accessed 7 July 2019.

As a member of the UN, Gambia has signed and ratified the following: International Covenant on Civil and Political Rights (Ratification 1979), International Covenant on Economic, Social and Cultural Rights (Accession 1979), International Convention on the Elimination of All Forms of Racial Discrimination (Accession 1978), The Convention on the Elimination of all Forms of Discrimination Against Women (Signed 1980), and Convention on the Rights of the Child (signed and ratified 1990) to mention a few.

²⁵² Under the AU, the Gambia has also acceded to several relevant regional human rights treaties, including the African Charter on Human and People's Rights (ratified in 1983), the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (ratified in 2005), and the African Union Convention on Preventing and Combating Corruption (ratified in 2009). The Gambia signed the African Charter on Democracy, Elections and Governance in 2008, but has yet to ratify it.

²⁵³ *Ibid.*

²⁵⁴ The Gambia has also ratified the ECOWAS Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

²⁵⁵ H Christof op cit note 143 at 88.

However, since the 1990s, ECOWAS assumed a more political role following the wave of political reforms and the growing number of protracted domestic violent conflicts in the region.²⁵⁶ The ECOWAS Protocol on Democracy and Good Governance²⁵⁷ was adopted to enhance democratic elections in the region. The Gambia is a state party to this Protocol and has obligations to respect democratic elections in the region. Within that country, democratic elections are protected under Chapter V of its Constitution.²⁵⁸ The legal framework governing democratic elections in Gambia provides an adequate basis for the conduct of elections which are in line with the international standards of democratic elections.²⁵⁹

3.2.2 The Context of Pre 2016 Elections Dispute

The dispute over the 2016 Gambian elections is best understood by considering the context of the Gambia in 2016 and before. The Republic of Gambia, under President Yahya Jammeh, had a history of authoritarianism and gross abuses of human rights.²⁶⁰ Several reports have pointed to these abuses.²⁶¹ Human rights organizations in and outside the Gambia had repeatedly reported the high level of systematic human rights violations, torture, the disappearance of journalists and activists, and the general atmosphere of intimidation in the country.²⁶² Jammeh came into power through a bloodless coup in 1994²⁶³ and was officially elected President in 1996 and consolidated his rule and grip on power.²⁶⁴ Furthermore, he was re-elected in 2001, 2006, and 2011.²⁶⁵ However, these elections were contested and were generally not in line with international standards of ‘free and fair’ elections.²⁶⁶ During his reign, Jammeh was popularly known for his widely quoted interview with the BBC that he would ‘rule this country for one

²⁵⁶ H Christof ‘Governance Transfer by the Economic Community of West African States’ *SFB-Governance Working Paper* (2013)47pg 42.

²⁵⁷ Protocol on Democracy and Good Governance (2001).

²⁵⁸ The Constitution of the Republic of Gambia of 1997, Chapter V.

²⁵⁹ *Ibid.*

²⁶⁰ Human Rights Watch ‘Gambia’, available at <https://www.hrw.org/africa/gambia>, accessed 20 July 2019.

²⁶¹ Human Rights Watch ‘State of Fear: Arbitrary Arrests, Torture, and Killings’ 2015. Available at: <https://www.hrw.org/report/2015/09/16/state-fear/arbitrary-arrests-torture-and-killings>, accessed 30 October 2019.

²⁶² Amnesty International ‘Opposition in the Gambia. The Danger of Dissent’ (2016). Available from <https://www.amnesty.org/en/documents/afr27/4705/2016/en/>, accessed 10 October 2019.

²⁶³ H Christof op cit note 256 at 88.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ H Christof op cit note 256, Perfect, David (2010), P David ‘The Gambia Under Yahya Jammeh: An Assessment, in the Round Table’ (2010) *The Commonwealth Journal of International Affairs* at 99, 406, 53–63. See also S Abdoulaye *The Paradox of Third-Wave Democratization in Africa: The Gambia under AFPRC-APRC Rule, 1994–2008* (2009).

billion years [...] if Allah says so'.²⁶⁷ In brief, Jammeh's rule was characterised by the lack of respect for human rights.

3.2.3 Election Dispute (2016)

In 2016, the Republic of the Gambia went to the polls. The incumbent President Jammeh lost the elections to Mr. Adama Barrow the opposition leader.²⁶⁸ The results showed that the opposition Mr. Adama Barrow, had garnered 45.5% of total votes,²⁶⁹ while Mr. Jammeh, the incumbent President had received 36.6%.²⁷⁰ In reaction to the opposition victory, President Jammeh immediately conceded defeat. In a public speech President Jammeh congratulated the opposition leader Mr. Adama Barrow. He promised, to provide guidance on power transition and when selecting a government.²⁷¹ The Africa Union and the Economic Community of West African States congratulated the people of the Gambia for peaceful, free, fair and transparent presidential elections.²⁷² The country had shown commitment to democracy.²⁷³

Contrary to the provisions of the Gambian Constitution and the regional laws governing democratic elections in Africa, a week after conceding defeat, Jammeh rejected the election results.²⁷⁴ He stated that he no longer had trust in the electoral process given the irregularities in aggregating results in one of the regions.²⁷⁵ Jammeh cited irregularities in the election and unilaterally called for its annulment.²⁷⁶ He therefore refused to step down.²⁷⁷

After his refusal to step down, and refusal to comply with the electoral laws and the constitution, Jammeh deployed troops on the streets of Banjul. This was to maintain control of the security apparatus. The army occupied the offices of the Electoral Commission, and staff

²⁶⁷ BBC News 'Gambia's Yahya Jammeh Ready for "Billion-Year" Rule', 12 December 2011, available at: <https://www.bbc.com/news/world-africa-16148458>, accessed 10 August 2019.

²⁶⁸ Parliamentarians for Global Action. 'PGA Members Welcome the Peaceful Transition in the Gambia and Call on their Colleagues to Now Take Action for Human Rights', available at: <https://www.pgaction.org/news/transition-gambia.html>, accessed 7 July 2019.

²⁶⁹ Independent Electoral Commission 'Final Election Results: Presidential Election' 1 December 2016, Banjul: IEC.

²⁷⁰ P Rao. 'Gambia's Democracy Survives political Turbulence', available at <https://www.un.org/africarenewal/magazine/may-july-2017/gambia%E2%80%99s-democracy-survives-political-turbulence>, accessed May 25 2019.

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

²⁷⁵ H Christof op cit note 256 at 87.

²⁷⁶ P Rao op cit note 244.

²⁷⁷ L D'Aiello 'The Case of Gambia. A template for Democratic Transition', Available at <https://www.fpri.org/article/2018/08/the-case-of-the-gambia-a-template-for-democratic-transition/>, accessed on 15 August 2019.

was hindered from entering the building. There was no sign of handing over power to the President elect.²⁷⁸ Consequently, an estimated number of 45,000 Gambians fled to neighbouring Senegal and Guinea, including the President-elect Mr. Barrow. The Gambian security forces arrested soldiers perceived as loyal to Mr. Barrow, the opposition leader. Independent radio stations were closed. Opposition supporters were detained.²⁷⁹

On the other hand, the political establishment surrounding President Jammeh crumbled.²⁸⁰ For example, his government officials deserted their posts and the head of the Electoral Commission went into hiding after announcing the results of the election. The Chief Justice of the Supreme Court refused to hear Jammeh's case challenging election results.²⁸¹ Several human rights groups accused Jammeh of human rights abuses and urged the international community to stand by Mr. Barrow, the opposition leader.²⁸²

3.2.4 The Reaction of ECOWAS and Mediation in the Region

In reaction to Jammeh's refusal to step down, the ECOWAS stood by President-elect Mr. Barrow. ECOWAS leaders decided to send a mediation commission to Banjul to talk to Mr. Jammeh. The acting ECOWAS chairperson headed the delegation to Banjul on December 13, 2016, together with the presidents of Nigeria, Ghana, and Sierra Leone and the UN Special Representative for West Africa. Despite the high-ranking composition (comprising all Anglophone heads of State within ECOWAS), the commission did not manage to convince Mr. Jammeh to step down.²⁸³ Their first mediation attempt failed.

3.2.5 Failure of Mediation

ECOWAS leaders in their attempts to mediate the election dispute, were convinced that they needed to adopt more credible sanctions.²⁸⁴ At their regular summit on December 17, 2016, in Abuja, the leaders decided that ECOWAS would continue mediation efforts through President Buhari of Nigeria and President Mahama of Ghana. The heads of State agreed to attend the

²⁷⁸ Research Gate 'ECOWAS and the restoration of Democracy in the Gambia' available at https://www.researchgate.net/publication/316455545_ECOWAS_and_the_Restoration_of_Democracy_in_the_Gambia/citation/download at 87.

²⁷⁹ 'World Report 2018: Gambia Human Rights Watch' Available at: <https://www.hrw.org/world-report/2018/country-chapters/gambia>, accessed 20 July 2019.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ H Christof op cit note 256 at 87.

²⁸⁴ *Ibid.*

inauguration of President-elect Barrow, to be sworn in Senegal on January 19, 2017, in conformity with the Gambian Constitution.²⁸⁵ The heads of State also agreed that the ECOWAS would be obliged to take all necessary means to enforce the results of the elections strictly.²⁸⁶ ECOWAS placed standby forces on alert and formally authorized them to intervene using the military if President Jammeh did not step down.²⁸⁷ Further negotiations between President Buhari and President Jammeh in Banjul ended on January 13 without any breakthrough. As the deadline of mediation in January 18 approached, the option of military intervention became the solution.²⁸⁸

3.2.6 Military Intervention in the Gambia

On January 18, troops from Senegal, Nigeria, Ghana, Mali, and Togo moved towards the border with the Gambia.²⁸⁹ In the afternoon of January 19, Adama Barrow was sworn in as President in the Gambian embassy in Dakar, Senegal under the sponsorship of ECOWAS and in the presence of many international diplomats.²⁹⁰ The same day, the UN Security Council unanimously approved Resolution 2337.²⁹¹ The Resolution expressed its full support for ECOWAS's 'to ensure, political stability and honour the will of the people of The Gambia as shown in the election results'.²⁹² On the same day, some troops invaded the Gambian territory, but a last-minute negotiation by Mauritania and Guinea Presidents quickly halted the invasion. The imminent threat of military aggression caused thousands of Gambians to flee to Senegal. Jammeh's army chief pledged his allegiance to President Barrow. Most of Jammeh's cabinet resigned.²⁹³ As a result, Jammeh eventually agreed to step down and go into exile.²⁹⁴ The ECOWAS contingents then secured Gambian territory, and it was decided that ECOMOG would stay for a further three months in Gambia to ensure peace and stability, as requested by President Barrow.²⁹⁵

²⁸⁵ *Ibid* at 92.

²⁸⁶ ECOWAS *Final Communiqué: 50th Ordinary Session of the ECOWAS Authority of Heads of State and Government*, Abuja: ECOWAS. (2016).

²⁸⁷ H Christof op cit note 256 at 87.

²⁸⁸ *Ibid* at 92.

²⁸⁹ *Ibid* at 92.

²⁹⁰ *Ibid* at 92.

²⁹¹ United Nations Security Council *Resolution 2337 (2017)*.

²⁹² *Ibid*.

²⁹³ H Christof op cit note 256 at 92.

²⁹⁴ *Ibid* at 87

²⁹⁵ *Ibid* at 92

3.2.7 Lessons Learnt

There are many lessons learnt from this case. Firstly, Jammeh's actions were contrary to the provisions of article 23 of ACDEG which prohibits incumbent governments from refusal to step down after losing to an election.²⁹⁶ From the facts presented in this study, Jammeh's actions were, therefore, illegal because they were contrary to the ACDEG and the Gambian constitution. They were unlawful because President Jammeh had no jurisdiction to annul the election and call for a fresh election. His actions show that there was no separation of powers in the Gambia during his time. In addition, President Jammeh did not follow the due process of filing an election petition. Instead, he rejected and called for fresh elections. Furthermore, Mr. Jammeh went on to militarise the country and to capture state institutions. All these actions were undemocratic, forceful and not in line with the regional laws on elections and the constitution of the Gambia.

Second, in his attempt to retain and maintain power, President Jammeh violated many human rights of the Gambians. For example, he arrested opposition members, violating their rights to freedom of movement, freedom of liberty, freedom from slavery and torture and freedom of opinion and expression. Third, Mr. Jammeh's refusal to step down did not reflect the will of the people of the Gambia as stipulated by the law.²⁹⁷

More so, the reaction by the ECOWAS of military intervention in the Gambia shows the importance of the role the RECs may play in upholding democracy and rule of law among Member States. The military intervention by the ECOWAS troops forced Jammeh to comply with the region. Without the military, Jammeh could not have stepped down. This shows the important role the regional troops may play in enforcing democracy among states. Most importantly, the Gambians played an important role and made it possible to restore democracy in the Gambia. For example, the Chief Justice went into hiding and refused to hear Jammeh's case. This also showed non-tolerance to violations of democratic elections. The Military generals also played a key role by recognising the opposition leader as the new president. The recognition fast tracked Jammeh's losing grip of power.

Therefore, RECs can be authentic key drivers for democracy as demonstrated in the case of the Gambia. Although the ECOWAS had considered mediation to solve the election dispute, as

²⁹⁶ Art 23 of the African Charter on Democracy Elections and Governance, 2007.

²⁹⁷ Art 21 of the Universal Declaration of Human Rights 1948. See also Art 25 of International Covenant on Civil and Political Rights 1966.

one of the most important peaceful ways of conflict resolution, the approach could not force Jammeh to comply with the electoral regulations. Regional unity is also a very important instrument to regulate respect for human rights. Member states of the ECOWAS took the initiative and contributed troops for the restoration of Democracy in the Gambia. The ECOWAS leaders such as Buhari of Nigeria among others, showed good statesmanship by not condoning the illegal actions of President Jammeh. However, although the troops had started invading the Gambia, the ECOWAS continued to prioritise and value mediation. The act shows how the region valued the importance of mediation.

Finally, coordination was shown between the African Union and the United Nations Security Council which backed ECOWAS and gave it legitimacy in restoring democracy in Gambia.²⁹⁸ Thus, it remains an important lesson to learn from the Gambian case that only when the scenario of military invasion became credible did the Gambian regime accept the defeat.

3.2.8 Comparable Cases within the ECOWAS

Having examined the 2016-17 Gambia disputed election and the reaction by the ECOWAS, this part provides an analysis of other scenarios of contested elections within the ECOWAS Region. For instance, in the 2010 Ivory Coast disputed elections, the incumbent Gbagbo refused to concede defeat and to relinquish power after losing elections. The incumbent argued that there was malpractice in 3 regions in his country.²⁹⁹ The office holder petitioned to the Constitutional Court (CC) for invalidation of some votes in some constituencies in the Northern part of the country on the ground of malpractices.³⁰⁰ The CC agreed with his allegations and invalidated some votes in the three regions dominated by the opposition.³⁰¹ The international community did not agree and thus, recognised the results of the IEC and endorsed the opposition leader as the legitimate president of Ivory Coast.³⁰² The international community decided to support the IEC mainly on the basis of its independence. Although the decision not to comply with the CC by the international community infringed on the principle of legality,

²⁹⁸ H Christof op cit note 256 at 87.

²⁹⁹ Reuters 'Ivory Coast's Gbagbo Rejects Results in 3 Regions', available at <http://www.reuters.com/article/2010>, accessed on 25 August 2011.

³⁰⁰ D Zounmenou & I K Souaré 'What Way out of the Post-election Imbroglio in Cote d'Ivoire?' available at <http://www.w.the-african.org/blog/?p=384>, accessed on 30 August 2011.

³⁰¹ CNN World 'Ivory Coast Invalidates Earlier Results; Declares Win for Incumbent' available at http://articles.cnn.com/2010-12-03/world/ivory.coast.election_1_ivory-coast-laurent-gbagbo-prime-minister-alassane-ouattara?_s=PM:WORLD, accessed 30 August 2011.

³⁰² O Taiwo 'Resolving the Crisis in Ivory Coast: The Role of Regional Organizations' Available at http://www.brookings.edu/opinions/2011/0127_ivory_coast_taiwo.aspx, accessed 26 August 2011.

the justification for the decision of the International community was that, there was lack of separation of powers within the courts. The lack of separation of powers violates the credibility of the court. As a result of the former president's refusal to step down, ECOWAS took a hard line against the situation in Ivory Coast. The ECOWAS imposed sanctions on Ivory Coast and suspended its membership to all ECOWAS decision making bodies.³⁰³ Thus, between December 2010 and April 2011, Ivory Coast was suspended. Yet, the incumbent regime declined to hand over power after his defeat in the election.³⁰⁴ Apart from democratic elections, the ECOWAS also suspended a number of West African Countries that had acquired power through military coups,³⁰⁵ for example, Burkina Faso in 2015.

The ECOWAS intervened in Guinea Bissau after the disputed 2005 elections. The elections required intervention by the ECOWAS and the United Nations, which proved relatively more successful.³⁰⁶ Perhaps learning its lesson from Guinea-Bissau, ECOWAS was much quicker to react to the attempts by President Mamadou Tandja of Niger who attempted to prolong his stay in power in 2008.³⁰⁷ Having failed to secure a two-thirds majority in parliament, Tanja organised a referendum on the extension of his term, after dissolving the Parliament and Constitutional Court. ECOWAS responded to these events by calling on Tandja to annul the elections. However, the incumbent refused to comply with the ECOWAS. The ECOWAS Heads of State suspended Niger's membership and Nigeria announced that it would evaluate the possibility of an intervention.³⁰⁸ ECOWAS also sent a delegation with ministers from Cape Verde, Guinea, Ghana, and Nigeria to negotiate a peace agreement, which proved successful.³⁰⁹ Therefore, all the above examples show that the region has fared reasonably well in its quest for democracy, peace and security when compared to the SADC region discussed below.

³⁰³M Frank. 'Prevalence of conflicts over the legitimacy of election results in Africa: can the regional economic communities (RECs) provide a panacea? A case study of ECOWAS and SADC' Unpublished Dissertation *Centre for Human Rights, University of Pretoria* (2011) at 25.

³⁰⁴ *Ibid.*

³⁰⁵ For example, Burkina Faso 2015 the ECOWAS rejected a Coup, In Guinea Bissau, ECOWAS only reacted when General Verissimo Correia Seabra ousted Yala in a military coup in 34 2003 after the country had been left without a government for several months. ECOWAS sent a delegation with ministers from Cape Verde, the Gambia, Guinea, Ghana, and Nigeria to negotiate a peace agreement, which proved successful.

³⁰⁶F Aggad & L Miyandazi *Understanding ECOWAS Efforts in Promoting a Governance Agenda: Adapting Regional Norms to Lessons from National Crises* (2016) at 11.

³⁰⁷ *Ibid* at 11.

³⁰⁸ *Ibid* at 11.

³⁰⁹ *Ibid* at 11.

3.3 The Case of Zimbabwe (2018)

3.3.1 Introduction and Legislative Framework

The Republic of Zimbabwe is a member of the United Nations³¹⁰ and the African Union.³¹¹ Zimbabwe has signed and ratified many international and regional human rights instruments adopted by the United Nations and the African Union including those particular to democratic elections.³¹² The country has made binding international commitments to adhere to the human rights standards stipulated in these universal human rights documents.³¹³ Recent reports stipulate that in 2017/18 prior to the elections, Zimbabwe had ratified six core international human rights treaties.³¹⁴ However, three of its core international human rights treaties were still pending for ratification.³¹⁵ In international law, ratification and implementation of human rights treaties demonstrate the State party's commitment to international norms and standards of human rights.³¹⁶ Treaties clarify what human rights mean in theory and practice. According to the UN reports, Zimbabwe has not complied with treaty bodies.³¹⁷ In 2017, the UN reported that Zimbabwe's had a backlog in reporting to treaty bodies.³¹⁸

Under the AU, Zimbabwe is a member of SADC and COMESA. SADC and COMESA were formed to promote economic cooperation and integration within (southern) African States.³¹⁹ However, overtime they have assumed a more political role, especially the SADC, following the wave of political reforms and the growing number of protracted domestic violent conflicts within Southern African states. To protect democratic elections, the SADC particularly has

³¹⁰ On 25 August 1980, Zimbabwe became a member of the United Nations (UN).

³¹¹ Zimbabwe became a member of the African Union since its formation in 2002.

³¹² The main document dealing with democratic elections is the African Charter on Democracy, Elections and Governance which was signed in 2018 by the newly elected President of Zimbabwe. However, Zimbabwe is yet to ratify the Charter.

³¹³ Art 21 of the Universal declaration of Human Rights, 1948.

³¹⁴ These include, The Convention on the Elimination of all Forms of Racial Discrimination (CERD), The International Covenant on Civil and Political Rights (CCPR), The International Covenant on Economic, Social and Cultural Rights (CESCR), The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), The Convention on the Rights of the Child (CRC) and the two Optional Protocols, and Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol.

³¹⁵ These are, the Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the International Convention for the Protection of all Persons from Enforced Disappearance (CED). Zimbabwe is also still to ratify the optional Protocols to the CCPR, ESCR and CEDAW

³¹⁶ United Nations, 'Statement of UN Resident Coordination in Zimbabwe. Sensitization workshop to the heard of Government Ministries', Harare, Zimbabwe (2017) at 4.

³¹⁷ *Ibid* at 4.

³¹⁸ For example, reports on the CERD, CCPR, ESCR, and CRPD CEDAW. Some of these reports were dating back to 1998. However, nothing has changed regarding the status of the backlog.

³¹⁹ H Christof op cit note 165 at 88.

adopted ‘Principles and Guidelines Governing Democratic Elections’.³²⁰ These principles, while not binding, are persuasive and reflect the shared values and commitments by SADC Member States relative to democratic governance. Though the guidelines are soft law, they are important because they provide a practical and normative framework for decision making and instil a sense of responsibility and accountability among Member States.

The principal objective of the SADC Principles and Guidelines Governing Democratic Elections is to promote the holding and observation of democratic elections based on the shared values and principles of democracy, the rule of law and respect for human rights enshrined in the SADC Treaty signed at Windhoek, Namibia in 1992.³²¹ For Zimbabwe, democratic elections are protected under chapter 7 of its constitution,³²² and the Electoral Act.³²³ The legal framework governing democratic elections in Zimbabwe’s provides adequate basis for the conduct of elections which are in line with the international and regional instruments.

3.3.2 Pre- Election Dispute

The elections in Zimbabwe have been highly controversial because they have been disputed since 2002.³²⁴ Connected to democratic elections is Zimbabwean politics which has been unstable for almost two decades.³²⁵ The most recent highly disputed elections are the 2008, 2013 and 2018 general and presidential elections.³²⁶

The disputed elections in Zimbabwe have often led to gross violations of human rights. Amnesty International and Human Rights Watch have often cited deterioration of conditions of human rights in Zimbabwe.³²⁷ The European Union, and the United Nations observer missions similarly argued that the Zimbabwean elections failed to meet international minimum standards in all its elections since 2002.³²⁸ Other human rights groups have constantly reported

³²⁰ Principles and Guidelines Governing Democratic Elections [Revised, 2015].

³²¹ *Ibid.*

³²² Chapter 7, The Constitution of Zimbabwe, 2013.

³²³ See Chapter VII, Zimbabwe Constitution.

³²⁴ N Dube ‘Impunity from Accountability for Election Crimes: Analysis of Crimes Committed by Zimbabwe Authorities and ZANU-PF Militia During the 2008 Election’ Unpublished Dissertation *University of Pretoria* 2008.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ Amnesty International ‘Amnesty International Report 2008 – Zimbabwe’ 28 May 2008, available at <https://www.refworld.org/docid/483e27bf2d.html>, accessed 22 July 2019. See also, Zimbabwe Events of 2008. Human Rights Watch ‘Zimbabwe: Events of 2008’, available at <https://www.hrw.org/world-report/2009/country-chapters/zimbabwe>, accessed 23 July 2019.

³²⁸ *Ibid.*

on gross violations of human rights. These include torture, repression of fundamental rights and freedoms, adoption of oppressive laws, killings, imprisonment and disappearance of political activists.³²⁹ The government of Zimbabwe has often deliberately disregarded the rights and provisions in the country's constitution.³³⁰

3.3.3 Systematic History of Disputed Elections in Zimbabwe

The causes of election disputes in Zimbabwe are systemic. All election outcomes in Zimbabwe since 2002, 2008, 2013 and 2018 have been subject to contestation.³³¹ These elections have been flawed mainly because of the institutional challenges within the governance of Zimbabwe. Dube argues that elections in Zimbabwe have been long contested as a result of deep-rooted institutional problems within the governance structures of the country.³³² Opposition leaders, mainly the Movement of Democratic Change (MDC), have often accused the ruling party Zimbabwe African National Union (ZANU PF) for election manipulation and rigging.

Contestations over elections in Zimbabwe have undermined the credibility of elections. Many Zimbabwean's have lost trust and confidence in the electoral processes. Every election dispute has affected the confidence and trust people have with the Zimbabwe Electoral Commission (ZEC). Most of Zimbabwe's election disputes have spilt into the courts for recourse. However, the courts have always ruled in favour of the ZANU PF, the ruling party.

Dube argues that the courts in Zimbabwe have been heavily and systematically politicised by the ruling party.³³³ For example, in *Tsvangirai v Mugabe and Another*³³⁴ the MDC has lost all the court cases, with the 2002 presidential challenge judgment yet to be released.³³⁵ In 2008, the credibility of the presidential election was undermined by the delay in announcing the results of the March 29' First Round' election. The election's result was delayed with over 60 days.³³⁶ The delay was unreasonable and led to lack of trust and confidence with the Zimbabwe Electoral Commission. Therefore, the MDC, the main opposition party, filed an urgent chamber application before the High Court. In *Movement for Democratic Change and Another*

³²⁹ Human Rights 'Zimbabwe', Available at <https://www.hrw.org/africa/zimbabwe>, accessed on 31 July 2019.

³³⁰ *Ibid.*

³³¹ N Dube op cit note 100.

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Tsvangirai v Mugabe and Another* [2006] ZWSC 73.

³³⁵ *Ibid.* The conduct of the 2002 election was strongly condemned by the Commonwealth, Norwegian observers, opposition parties, and Western governments

³³⁶ Human Rights 'Zimbabwe' op cit note 303.

*v Chairperson of the Zimbabwe Electoral Commission and Another (2008)*³³⁷, Judge Uchena ruled that Zimbabwe Electoral Commission (ZEC) had acted within the parameters of section 67A in the conduct of elections. Therefore, the judge dismissed the MDC's application. The Zimbabwe electoral commission declared no winner of the election and called for a runoff.³³⁸ The court's decision left many opposition leaders and Zimbabweans dissatisfied and lacking trust in the judiciary. Since the court declared no winner, on June 27, 2008, a runoff election was held. The atmosphere was not conducive for free and fair elections.³³⁹ Mugabe came victorious and the outcome was again highly contested.³⁴⁰

The SADC region endorsed the credibility of the elections even though the elections were marked with extreme violence.³⁴¹ On the contrary, the independent groups such as the Norwegian Centre for Human Rights reported that these elections did not meet minimum international standards.³⁴² The elections were characterised by extreme violence, political intimidation, arrest of political activists, and torture, among others.³⁴³

In 2013, presidential elections were due. Zimbabwe went to polls. However, the climate for free and fair elections was absent.³⁴⁴ It is reported that the political situation was violent similar to 2008 elections.³⁴⁵ It is also argued that President Mugabe repeated his tactics of previous years.³⁴⁶ The major opposition party withdrew from the elections two weeks before the Election Day³⁴⁷. There were allegations of the lack of transparency and unwillingness to facilitate significantly needed electoral reforms. As a result, Mugabe won a one-person competition.³⁴⁸ The legitimacy and credibility of these elections remained disputed.

³³⁷ Movement for Democratic Change v President of the Republic of Zimbabwe and Others, not yet reported, judgment no HH 28-2007.

³³⁸ *Ibid.*

³³⁹ V Kare 'Zimbabwe: The Elections on March 29 and the later Runoff event and by-elections on June 27, 2008'. *Norwegian Centre for Human Rights Report*, Available at: <https://www.jus.uio.no/smr/english/about/programmes/nordem/publications/2008/0808>, accessed 20 July 2019

³⁴⁰ *Ibid.*

³⁴¹ F Mchomvu op cit 277.

³⁴² V Kare op cit note 313.

³⁴³ *Ibid.*

³⁴⁴ Amnesty international op cit note 327.

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

³⁴⁷ Amnesty International 'Amnesty International Report 2008 – Zimbabwe' 28 May 2008, available at <https://www.refworld.org/docid/483e27bf2d.html>, accessed 22 July 2019. See also, Zimbabwe Events of 2008. Human Rights Watch 'Zimbabwe: Events of 2008', available at <https://www.hrw.org/world-report/2009/country-chapters/zimbabwe>, accessed 23 July 2019

³⁴⁸ *Ibid.* See also note 303.

3.3.4 Zimbabwe 2018 Elections Dispute

Unlike the Gambia, the case of Zimbabwe is deeply complex and systemic. One election dispute has led to another. Therefore, the 2018 presidential elections in Zimbabwe cannot be understood in isolation. It is difficult to discuss the 2018 disputed elections in Zimbabwe without making reference to the systemic history of contested elections in the country, especially the 2008 and 2013 elections. In 2018, after the military coup, Zimbabwe went to polls to elect a new government. However, the elections were tightly contested between the ruling party (Zanu PF) and the main opposition (the MDC Alliance). Unlike the previous years, the 2018 pre-election campaign was reported to be relatively peaceful from the outlook.³⁴⁹

The election dispute arose prior to the announcement of the election results³⁵⁰ and after the election results were announced.³⁵¹ Violence broke out.³⁵² Members of the opposition party rejected the results. Protests started in the capital city led by opposition members.³⁵³ These protests were followed by a military crackdown on political opponents.³⁵⁴ The military shot and killed at least six people during opposition protests in the capital Harare.³⁵⁵ Several people were injured.³⁵⁶ The military crackdown on civilians were widely condemned by the opposition leaders and the international community.³⁵⁷

Subsequently, the opposition MDC Alliance leader Nelson Chamisa challenged the election results announced by the Zimbabwe Electoral Commission. ZEC had declared Mnangagwa the winner after polling 50.8 percent of the vote against Chamisa with 44.3 percent.³⁵⁸ The opposition leader filed a case to the Constitutional Court, alleging that ZEC had manipulated the votes in favour of Mnangagwa. In his application, Chamisa cited Mnangagwa, ZEC and 21 other presidential candidates as respondents.

³⁴⁹ Amnesty international op cit note 301.

³⁵⁰ The protesters were violently demanding election results to be announced.

³⁵¹ Human Rights Watch 'World Report 2019', available at <https://www.hrw.org/world-report/2019/country-chapters/zimbabwe>, accessed on 23 July 2019.

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ Africa, Zimbabwe Constitutional Court Starts Election Petition Hearing. Available at: http://www.xinhuanet.com/english/2018-08/22/c_137410328.htm, accessed 4 October 2019.

In *Chamisa v Mnangagwa & 24 Others*,³⁵⁹ Chamisa cited irregularities by the Zimbabwe Electoral Commission. ZEC had announced several (3 times) conflicting results.³⁶⁰ Therefore, it was difficult to know the actual result of the elections. These conflicting results fuelled the lack of trust and confidence with the electoral commission. More so, these results affected the relationship between the people and the electoral commission. Critical to understand the 2018 elections in Zimbabwe is the role and image of the Zimbabwe Electoral Commission. The conduct of ZEC in announcing several conflicting results led to unrest, conflict and the lack of trust from the general public, especially opposition members.

Therefore, in *Chamisa v Mnangagwa & 24 Others*,³⁶¹ the MDC argued for the nullification of the election results, on the basis that Mnangagwa had narrowly won the election and there were many mathematical irregularities regarding the election result. Furthermore, the MDC argued that the election results did not reflect the will of the people. Apart from mathematical irregularities, the MDC also pointed out the politicization of the ZEC and its members including the chair of the Electoral Commission.³⁶² However, the court, despite all the irregularities, declared Mnangagwa the winner of the election in terms of section 93(4) (a) of the Constitution of Zimbabwe.³⁶³ The Court insisted that the irregularities of the Zimbabwe Electoral Commission did not affect the outcome of the election. Thus, the Court concluded that it is an internationally accepted principle of election disputes that an election is not set aside easily, merely on the basis that an irregularity occurred.³⁶⁴

3.3.5 History of the Reaction of SADC to Elections Results in Zimbabwe

The Zimbabwe election disputes have presented the SADC region with many challenges stretching back as early 2000s. For example, in 2004, SADC election observers were considered to have harmed the credibility of elections in Mozambique. The poll, although contested, was declared free and fair prematurely by the SADC observers.³⁶⁵ This caused dissatisfaction among the electorates in Mozambique. The same was repeated in Zimbabwe in

³⁵⁹ *Chamisa v Mnangagwa & 24 Others* [2018] ZWCC 42.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ Section 93(4) (a) of the Constitution of Zimbabwe.

³⁶⁴ V Kare Op cit note 333.

³⁶⁵ SAIIA ‘SADC Election Standards Harm its Credibility: Mozambique’s poll was declared free and fair prematurely’, available at <https://saiia.org.za/research/sadc-election-standards-harm-its-credibility-mozambiques-poll-was-declared-free-and-fair-prematurely/>, accessed 20 July 2019.

2005. SADC endorsed an election process that was already flawed with heavy restrictions on freedom of assembly and the clamping down on the independent media.³⁶⁶

In the case of Zimbabwe, SADC has a history of congratulating the government of Zimbabwe after fraudulent and contested elections.³⁶⁷ For example, in a communiqué issued by SADC following the extraordinary SADC summit held on 28-29 March 2007 in Dar es Salaam, Tanzania, SADC recalled that the Zimbabwe's election of 2002 was democratic, free and fair and the summit reaffirmed its solidarity with the government and the people of Zimbabwe.³⁶⁸ SADC endorsed these elections despite the fact that the opposition, mainly the MDC had lamented that the election was unfair and fraudulent.³⁶⁹

In 2008 Zimbabwe contested elections, SADC remained silent until the matter was discussed by the AU at its ordinary session in Sharm El-Sheikh in Egypt from 30 June - 1 July 2008. The AU decided that mediation of the crisis be vested into SADC.³⁷⁰ Thus, SADC had not made any initiative except the AU.³⁷¹ Subsequently, following the recommendations of the AU, SADC appointed Thabo Mbeki as a mediator of the crisis in Zimbabwe. However, SADC did not issue any public criticism against the 2008 election which was marred by a lot of irregularities.³⁷² SADC abstained not only from stopping the recognition of Mugabe as the lawful head of Zimbabwe, but also from preventing him from attending the SADC summit held in Johannesburg, South Africa on 17 August 2008 and other subsequent summits.³⁷³

SADC's involvement in Zimbabwe's crisis was not in vain. Its sponsored mediation, led by Thabo Mbeki, led to the Global Political Agreement (GPA) which resulted in the formation of the Government of National Unity (GNU) which was signed on 15 September 2008.³⁷⁴ SADC did not act to address the situation in Zimbabwe despite some SADC members openly criticising Mugabe's regime. For example, Botswana openly criticised Mugabe and declined

³⁶⁶ See Communiqué 2007 Extra-Ordinary SADC Summit of Heads of State and Government, 28th - 29th March 2007, Dar-es-Salaam available at <http://www.dfa.gov.za/docs/2007/sadc0330.htm>, accessed 23 Aug 2011.

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ G Gawthra 'The role of SADC in managing political crisis and conflict: the cases of Madagascar and Zimbabwe' www.fes.de/cgi-bin/gbv.cgi?id=07874&ty=pdf, accessed 23 August 2011.

³⁷¹ *Ibid.*

³⁷² S 'Zimbabwe's 2008 Harmonized Elections, Regional and International Reaction' Available at www.kas.de/upload/dokumente//2010/05/Defying_9.pdf, accessed 22 August 2011 at 152

³⁷³ *Ibid.*

³⁷⁴ S Eppel & B Raftopoulos 'Political crisis, mediation and the prospects for transitional justice in Zimbabwe', available at http://www.csls.ox.ac.uk/documents/EppelandRaftopolous_Zim_Final.pdf, accessed 2 September 2011.

to recognise him as the legitimate leader of Zimbabwe following the 2008 disputed election.³⁷⁵ SADC, for many years, has been criticised for its unwillingness to openly condemn ZANU-PF's government in Zimbabwe on human rights issues generally and on the recurring flawed electoral processes.³⁷⁶

3.3.6 SADC Reaction to Zimbabwe Elections in 2018

The 2018 elections in Zimbabwe were received with controversy and violence.³⁷⁷ The disputed elections were followed by a military crackdown on political opponents. The military shot and killed at least six people during opposition protests in the capital, Harare, after the announcement of the result.³⁷⁸ While the Zimbabwe military was killing people, SADC, the African Union and the Common Market for Eastern and Southern Africa all officially endorsed Zimbabwe's election as credible, free and fair.³⁷⁹ The SADC Election Observer Mission (EOM) stated that the election 'represented a political watershed and a positive change in politics in the history of the country'.³⁸⁰ According to the SADC Chair 'the elections were in conformity with the SADC Treaty, the SADC Protocol on Politics, Defence and Security Cooperation and the revised SADC Principles and Guidelines Governing Democratic Elections (2015)'.³⁸¹ Therefore, the elections were considered legal and legitimate. For the African Union, former Ethiopian Prime Minister, Hailemariam Desalegn, described the election as an occasion that "marked an important moment in the democratic transition" in Zimbabwe.³⁸² COMESA also stated that, the election had offered an "important opportunity to build on a new foundation".³⁸³ However, no steps were taken by the SADC region regarding the 2018 military crackdown, death and many injuries of civilians upon the announcement of election results. As a result of the pre-mature announcement of election results by the SADC region, the Nordic

³⁷⁵See Botswana refuses to recognise Mugabe government available at http://www.mofaic.gov.bw/index.php?Option=com_content&task=view&id=316&Itemid=9, accessed 2 September 2011). September 2011.

³⁷⁶ G Gawthra OP CIT 344.

³⁷⁷Human Rights Watch 'Zimbabwe: Events of 2018', available at <https://www.hrw.org/world-report/2019/country-chapters/zimbabwe>, accessed on 23 July 2019.

³⁷⁸ *Ibid.*

³⁷⁹N Anderson 'SADC and AU endorse Zimbabwe election as military battles protesters: The African Union is happy but will Zimbabweans be?' available at: <https://www.thesouthafrican.com/news/sadc-au-endorse-zimbabwe-election/>, accessed 23 July 2019.

³⁸⁰ *Ibid.*

³⁸¹ M D Augusto 'SADC Electoral Observation Mission (SEOM) To the Republic of Zimbabwe Preliminary Statement' (2018

³⁸² *Ibid.*

³⁸³ *Ibid.*

African Centre for Local Democracy warned that it was still too early to really pass comment on the election.³⁸⁴

The European Union delegation, tasked with observing Zimbabwe elections, released a preliminary report, citing that the political climate had improved, unlike the previous years but however, the playing field had remained uneven.³⁸⁵ The elections had been marred by voter intimidation and an untrustworthy polling process and ultimately the military crackdown on civilians. Although these recommendations were favourable, they point to institutional problems within the context of SADC.³⁸⁶ Unlike the ECOWAS, the SADC's endorsement of the disputed election remains a concern and a threat to democratization.

3.3.7 Other Comparable Cases in the SADC Region

In 2004, SADC election observers prematurely endorsed Mozambique's polls.³⁸⁷ In Zimbabwe, elections 2008, 2013 and 2018 have been the same. Similar challenge was found in the DRC elections of 2018. The SADC election monitors also endorsed the 'Democratic Republic of Congo's presidential elections which were heavily contested'.³⁸⁸ The 2018 DRC elections were supposed to have been held in 2017. Kabila refused to stepdown and postponed elections for over a year, very little was done from SADC to uphold the rule of law and democracy in the DRC.³⁸⁹ Prior to the elections, SADC sent Electoral Advisory (SEAC) and Electoral Commissions Forum of SADC Countries (ECF-SADC) to conduct a Joint Electoral Assessment Mission to the Democratic Republic of Congo (DRC) to assess the electoral administration capacity and technical needs of the National Independent Electoral Commission (CENI) ahead of the country's anticipated national elections in December 2018.³⁹⁰ However, this was insufficient, the elections were later disputed.³⁹¹

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.*

³⁸⁷ V Kare, Op cit note 339.

³⁸⁸ SABC News 'Regional observers endorse Congo's election – with caveats', available at <http://www.sabcnews.com/sabcnews/regional-observers-endorse-congos-election-with-caveats/>, accessed on 31 August 2019.

³⁸⁹ SADC Electoral Advisory and Electoral Commissions Forum of SADC Countries (ECF-SADC) Conduct a Joint Electoral Assessment Mission to the Democratic Republic of Congo (2017), available at <https://www.sadc.int/news-events/news/sadc-electoral-advisory-seac-and-electoral-commissions-forum-sadc-countries-ecf-sadc-conduct-joint-electoral-assessment-mission/>, accessed on 31 July 2019.

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

In Malawi (2019) the SADC alongside COMESA Electoral Observation Mission endorsed the election outcome in its preliminary statement. The SADC reported the peaceful political and security environment that existed before, during and immediately after polling day.³⁹² However, the elections were disputed by the opposition parties and the voters.³⁹³ The court also annulled the election result after finding gross errors and irregularities from the Malawi Electoral Commission (MEC) and the court called for fresh elections.³⁹⁴

3.3.8 Lessons Learnt

There are lessons learnt from the failures or challenges of the SADC region. First, the SADC region has not been proactive on election disputes. Secondly, opposition parties within SADC Member States have been weak in their legal and political strategies to prevent electoral malpractices in the region. Strong opposition parties have ways and strategies to win political power despite the challenges posed by incumbent regimes. In SADC, this study shows that opposition parties have always been victims of political injustices and have failed to provide alternatives to these injustices.

In addition, critical to this study is the view that SADC Member States have been condoning electoral malpractices within the region. The case of Zimbabwe presents a good picture of the lack of political will among SADC Member States to hold the Zimbabwean government accountable. The lack of appropriate responses on the Zimbabwean case from SADC has led to several disputed elections in the region. The SADC observer mission has always endorsed contested and fraudulent elections. This has also been a drawback to democratization. Unlike the ECOWAS, the SADC remains lacking enforcement mechanisms to protect democratic elections. As pointed out by scholars in this study, the region remains highly politicised which makes democratization on the region a big challenge.

3.3.9 Conclusion

This chapter has shown that the Gambia and Zimbabwe have contested elections for a number of years. This has been a result of a number of reasons. First the incumbent governments did

³⁹² SADC Electoral Observation Mission presents Preliminary Statement following the holding of 2019 Tripartite Elections in Malawi, 2019.

³⁹³ Al Jazeera, Malawi's disputed election: Court to rule on 2019. Available at: <https://www.aljazeera.com/news/2020/02/malawis-disputed-election-court-rule-2019-results-200203071211506.html>

³⁹⁴ BBC NEWS. Malawi election: Court orders new vote after May 2019 result annulled. Available at: <https://www.bbc.com/news/world-africa-51324241>, accessed 5 February 2020.

not respect human rights. The lack of political and electoral reforms in these states led to election disputes. The lack of these reforms has been a true reflection of dictatorship in these two countries. Second, opposition parties were too weak to prevent electoral malpractices. Hence, there was a cycle of contested elections for many years in these two countries. Third, the chapter has shown the role played by the RECs in the Gambia (2016), and Zimbabwe (2018) disputed elections. Comparable examples on the work of RECs have been discussed. The Chapter shows that RECs have made good attempts to improve democracy in their regions despite the shortcomings and challenges faced. The chapter has also compared the ECOWAS and SADC regions response to election disputes. The chapter concludes that between the two regions, the SADC remains a challenged region democratically, while the ECOWAS has done some progress in the realization of democracy in its region.

CHAPTER FOUR: THE ROLE OF REGIONAL ORGANIZATIONS IN UPHOLDING CREDIBILITY AND LEGITIMACY OF ELECTORAL PROCESSES IN AFRICA

4.1 Introduction

This chapter examines the role of the Regional Organizations (RECs) in upholding credibility and legitimacy of electoral processes in Africa. To achieve this, the chapter first demonstrates that RECs are critical stakeholders in ensuring credible and legitimate elections within AU Member States. RECs have helped Member States comply with their international legal commitments on democratic elections.³⁹⁵ For example, the ECOWAS have dealt with protection of electoral processes in the case of the Gambia in 2016 through a military intervention when the incumbent President refused to step down from power.³⁹⁶

Second, the RECs have dealt with election disputes through political dialogues, negotiations and mediations. For instance, in the case of Zimbabwe 2008, the SADC region facilitated negotiations, mediation and political dialogue to political parties in Zimbabwe. This facilitation led to a power sharing agreement.³⁹⁷ This power sharing agreement led to increased political participation to opposition parties in Zimbabwe. Third, the chapter shows that RECs are protecting democratic elections through election monitoring and observation.³⁹⁸ Election observation is important to ensure the integrity of the election. Election observation can be an effective detector and deterrent of integrity and legitimacy problems.³⁹⁹ Through election observation RECs provide recommendations to States on their conduct of democratic elections. Although election monitoring and observation are important, this chapter highlights existing challenges by Election Monitoring Bodies (EMB) established by the RECs.⁴⁰⁰

³⁹⁵ G Lynch & G Crawford 'Democratization in Africa 1990-2010: An Assessment' (2011).

³⁹⁶ ECOWAS *Final Communiqué: 50th Ordinary Session of the ECOWAS Authority of Heads of State and Government*, Abuja: ECOWAS. (2016).

³⁹⁷ T Mukuhani 'Zimbabwe's Government of National Unity: Successes and Challenges in Restoring Peace and Order' *Journal of Power, Politics & Governance* June 2014, Vol. 2, No. 2, pp. 169-180

³⁹⁸ The SADC Election Observer Mission is a good example where RECs are involved in election observation.

³⁹⁹ International Election Observation, 'ACE Electoral Knowledge Celebrating twenty years of sharing electoral knowledge', available at: <https://aceproject.org/electoral-advice/election-observation/international-election-observation>, accessed 2 November 2019.

⁴⁰⁰ Election observation is not an end in itself. If observation is to have a meaningful impact, the underlying intention must be to assist participating States in implementing their election-related commitments and obligations. Thus, a core part of election observation is the final assessment and recommendations offered by

Fourth, RECs also protect elections through regional their courts and tribunals.⁴⁰¹ The REC courts and tribunals play an important role in protecting, individuals and corporate on violations of their human rights. Their decisions are binding and must be respected by the States. Linked to the work of REC courts and tribunals is the African Commission on Human and Peoples' Rights (ACHPR), which is a quasi-judicial body tasked with promoting and protecting human rights and collective (peoples') rights throughout the African continent as well as interpreting the African Charter on Human and Peoples' Rights and considering individual complaints of violations of the Charter.⁴⁰²

Fifth, this chapter demonstrate that human rights are interdependent and interconnected.⁴⁰³ Therefore, the right to vote is connected and related to several human rights. No human right can be enjoyed in isolation. When democratic elections are protected, several human rights are protected too. The right to vote promote and protect a whole range of human rights and freedoms which includes the political participation of women, youth and vulnerable groups in governance of their country. It is through the right to vote that citizens and opposition parties can express their different opinions and freely challenge governance views about their country. Through the right to vote, the sovereignty of a people is enhanced. This right also affirms people's right to self-determination. Finally, this Chapter shows that, while RECs demonstrate commitment to ensure credible and legitimate elections in their regions. However, in practice States often fail to comply with the REC's obligations.⁴⁰⁴ States also often fail to report timeously to the treaty bodies. Moreover, in some cases, states have failed to ratify treaty provisions to improve human rights and democratic elections in their domestic laws.⁴⁰⁵ As a result, human rights are affected.

monitoring bodies to improve the conduct of elections. Election observation will be beneficial only to the degree that these recommendations are given serious consideration and effectively addressed. If they are not, there is a real risk that electoral shortcomings and vulnerabilities will persist and, in all likelihood, increase.

⁴⁰¹ For example, ECOWAS Court of Justice is a regional Court for the West African States and the SADC Tribunal for Southern African States to mention a few.

⁴⁰² W Claude. 'Organisation of African Unity and the Promotion of Human Rights' 1991 *The Journal of Modern African Studies*.

⁴⁰³ See Preamble of the Universal Declaration of Human Rights, 1948.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ United Nations Human Rights, Office of the High Commissioner, 'UN Treaty Database'. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=45&DocTypeID=29, accessed on 30 October 2019.

4.2 The Role of RECs in Promoting Credibility and Legitimacy of Elections

RECs are critical stakeholders in ensuring credible and legitimate elections within AU Member States. To achieve this, RECs have enacted instruments that complement the instruments of the AU in the protection of democratic elections.⁴⁰⁶ RECs have provided the platform upon which elections are freely conducted.⁴⁰⁷ To ensure credibility and legitimacy of elections, RECs have supported Member States to comply with their international legal commitments. For example, in 2016, when the incumbent President of the Gambia refused to step down after losing elections,⁴⁰⁸ the ECOWAS took an active role to facilitate mediation in view to convince the President to step down and uphold constitutionalism.⁴⁰⁹ Critical to this case is that all the mediation efforts failed, and the ECOWAS was left with no option but to resort to the use of force.⁴¹⁰ Although the use of force is contested under international law, in certain circumstances as in the case of the Gambia force was necessary to restore constitutional order and to uphold the election result. In addition, it is with the use of force that the legitimacy of the election result was restored and safeguarded. Therefore, the use of force, where necessary, is acceptable and has been implemented in view to uphold legitimacy and credibility of elections as evidenced in the case of the Gambia.

Linked to the work of RECs is the Peace and Security Council (PSC) of the AU. The PSC is the principal decision-making body for the prevention, management and resolution of conflicts on the African continent. It is primarily entrusted with enforcing the normative framework of the AU. Article 7 (g) of the Protocol to the PSC provides that the Peace and Security Council shall ‘institute sanctions whenever an unconstitutional change of Government takes place in a Member State.’⁴¹¹ RECs have protected democratic elections by use of sanctions to governments that have violated democratic elections. An example was 2010 when the incumbent President of Ivory Coast refused to step down after losing elections and declined to hand over power.⁴¹² The ECOWAS took a hard line against the situation in Ivory Coast. The

⁴⁰⁶ For example, the SADC has adopted the SADC Principles and Guidelines Governing Democratic Elections, The ECOWAS has adopted the Protocol on Democracy and Good Governance.

⁴⁰⁷ This idea is reflected under Art 21 of the UDHR, Art 25 of the ICCPR & Art 13 of the African Charter.

⁴⁰⁸ BBC News ‘Gambia’s Yahya Jammeh Ready for “Billion-Year” Rule’, 12 December 2011, available at: <https://www.bbc.com/news/world-africa-16148458>, accessed 10 August 2019.

⁴⁰⁹ H Christof op cit note 165 at 87.

⁴¹⁰ *Ibid.*

⁴¹¹ For example, Eritrea was suspended by the AU between April 2009 and January 2011 due to its support to insurgents in Somalia. Between December 2010 and April 2011, Ivory Coast was suspended but the incumbent regime declined to hand over power after its defeat in the election.

⁴¹² REUTERS, ‘ECOWAS lifts sanctions against Niger, Guinea’ Available at <https://www.reuters.com/article/ecowas-niger-idAFLDE72N20P20110324>, accessed 30 November 2019.

ECOWAS imposed sanctions on Ivory Coast and suspended its membership to all ECOWAS decision making bodies.⁴¹³ Similarly, the ECOWAS also suspended Niger and halted economic and bilateral assistance to the uranium-producing nation in 2009 after ex-President Mamadou Tandja changed the constitution to extend his rule.⁴¹⁴

Also, the ECOWAS suspended Guinea in 2009 following a bloody crackdown by security forces on protesters and included an arms embargo. Guinea was suspended as a result of the military junta that had seized power. The ECOWAS forced that country to hold elections and returned the country to democratic rule. Guinea was suspended from all the meetings of ECOWAS at heads of state and ministerial levels until constitutional order was restored.⁴¹⁵

Togo was suspended between February and May 2005 and the Comoros, when Mohamed Taki Abdoukarim died in office and his son fraudulently retained power by manipulating the election he then proceeded to win another election in 2010.⁴¹⁶ In Madagascar, the PSC declared some persons in the military junta unqualified to contest in some elections.⁴¹⁷ In 2019, The African Union suspended Sudan from all AU activities following continued violent attacks on civilians and the refusal by military government to hand over power to civilians and to conduct reforms including electoral reforms.⁴¹⁸ Based on these examples, sanctions are therefore useful in the event of violation of democratic elections.

⁴¹³ *Ibid.*

⁴¹⁴ REUTERS, 'ECOWAS lifts sanctions against Niger, Guinea' Available at <https://www.reuters.com/article/ecowas-niger-idAFLDE72N20P20110324>, accessed 30 November 2019.

⁴¹⁵ REUTERS, 'ECOWAS suspends Guinea until democracy restored', Available at <https://af.reuters.com/article/topNews/idAFJOE50A01T20090111>, Accessed on 30 November 2019.

⁴¹⁶ *Ibid.*

⁴¹⁷ E Y Omorogbe 'A Club of Incumbents? The African Union and Coups d'état.' (2008) 44(1) *Vanderbilt Journal of Transnational Law* at 123–154

⁴¹⁸ The Guardian 'African Union suspends Sudan over violence against protesters, Expulsion heaps pressure on military rulers to establish civilian-led transitional authority' (6 Jun 2019). Available at: <https://www.theguardian.com/world/2019/jun/06/sudan-african-union-suspension-military-rulers>, accessed 4 July 2019.

4.3 Mediation, Negotiations and Political Dialogue

RECs have promoted legitimacy and credibility of electoral processes in Africa through mediation, negotiations and political dialogues in the event of election disputes. Over the years RECs have successfully managed to negotiate talks within states to facilitate power sharing agreements in conflicts resulting from election disputes. Cases where the RECs have facilitated mediation and leading to power-sharing arrangements include Sudan (2013), under the auspices of the sub-regional Intergovernmental Authority on Development (IGAD),⁴¹⁹ Ivory Coast (2011)⁴²⁰ Chad⁴²¹ Liberia⁴²² Central African Republic (1996–2007) in post-electoral conflicts in Kenya (2007) and Côte d'Ivoire (2010).⁴²³ Most of these mediation efforts were supported by the African Union and some by the United Nations. This shows that RECs, as subsidiary bodies of the AU and UN, do not work in isolation.

The SADC region has facilitated mediation, negotiations and political dialogues in the case of Zimbabwe (2008–2009).⁴²⁴ Although the mediation efforts by the SADC region in 2008 has been highly criticised by many, the region showed concern over violations of human rights and instability within the country as a result of contested elections in the country.⁴²⁵ Thus, these efforts made a difference and led to power sharing arrangements and increased political participation for opposition parties in Zimbabwe. Therefore, mediation, negotiation and political dialogues by the RECs are great tools for conflict resolution.

⁴¹⁹ Fabiunke, L Luke 'Mediation outcomes from the second Sudan civil war: an analysis of Abuja and IGAD peace initiatives' 2013 *Monterey, California: Naval Postgraduate School*

⁴²⁰ D Ouattara 'ECOWAS and Intrastate Conflict Mediation in West Africa: The Case of Cote d'Ivoire', 2016 *University of Peace*.

⁴²¹ SG Amoo, IW Zartman 'Mediation by Regional Organizations: The Organization for African Unity (OAU) in Chad' in J Bercovitch, JZ Rubin (eds) *What ended Zuma's mediation in Libya?* available at <https://issafrica.org/amp/iss-today/what-ended-zumas-mediation-in-libya>, accessed on 20 November 2019.

⁴²² N Okai, M Abdallah, L Amedzrator, S Brewoo & F Okyere. *Mediating Conflict in West Africa 'An overview of regional experiences'* 2014.

⁴²³ A Mehler 'Not Always in the People's Interest: Power-Sharing Arrangements in African Peace Agreements (2012) 83 *GIGA Working Papers*

⁴²⁴ V Kare 'Zimbabwe: The Elections on March 29 and the later Runoff event and by-elections on June 27, 2008'. *Norwegian Centre for Human Rights Report*, Available at: <https://www.jus.uio.no/smr/english/about/programmes/nordem/publications/2008/0808>, accessed 20 July

⁴²⁵ N Dube op cit note 100.

4.4 Elections Monitoring and Observation to Uphold Credibility and Legitimacy of Elections

To enhance credibility and legitimacy of elections, RECs have been involved in pre and post electoral observation. These are instrumental to achieve credible and legitimate electoral processes in Africa. Elections must not only be free and fair; they must also be seen to be so.⁴²⁶ Election observation enhances the credibility and legitimacy of elections. Through election observation by the RECs the electorates can express their sovereignty and their self-determination. The concept of sovereignty and self-determination provide the basis for the authority and legitimacy of government.⁴²⁷ Election observation by the RECs also enhances the integrity of election processes, by deterring and exposing irregularities and fraud and by providing recommendations for improving electoral processes.⁴²⁸

Through the RECs, election observation can promote public confidence as warranted, promote electoral participation and mitigate the potential for election-related conflict.⁴²⁹ Thus, electoral observation and monitoring by the RECs have become an integral part of the democratic and electoral processes in Africa. The work of the election observers has enhanced the transparency and credibility of elections and democratic governance in Africa and the acceptance of election results throughout the continent. In some cases, election observation and monitoring missions can also play a key role in diminishing conflicts before, during and after elections,⁴³⁰ and in strengthening acceptance of election outcomes and improving the legitimacy of elected governments.⁴³¹

Election monitoring and observation may take two main forms: (a) long-term, covering all the phases of the electoral process pre and post electoral audits and (b) short-term, covering mainly polling day activities.⁴³² These processes are key instruments for evaluating and assessing

⁴²⁶M Abutudu 'Monitoring and Observation of Elections in Africa' Programme Officer for the African Association of Political Science, Pretoria pg 1

⁴²⁷ The Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers launched at the United Nations (UN) in October 2005.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ The African Union, Guidelines for African Union Electoral Observation and Monitoring Missions 20 February 2002.

⁴³¹ L Garber and E. Bjorlund 'Election Monitoring in Africa' in F Eribo *Window on Africa: Democratization and Media Exposure*, Geenville

⁴³² In the SADC region bodies such the Electoral Commissions Forum of SADC countries (ECF), the Electoral Institute of Southern Africa, the SADC Parliamentary Forum, the SADC Electoral Support Network and many national and regional civil society organisations, including NGOs, FBOs and trade unions, have become increasingly involved in election observation/monitoring

whether the electoral process in any given country has been conducted in a free, fair, transparent and credible manner.⁴³³

Although the elections monitoring and observation is important for credible and legitimate elections, in practice the election observer Missions established by the RECs have not always displayed integrity in their regions. This has often compromised the legitimacy and credibility of elections. For example, in 2004, SADC election observers prematurely endorsed Mozambique's polls.⁴³⁴ In Zimbabwe's elections of 2008, 2013 and 2018, elections were endorsed even though there had been contestation. Most recently, similar challenges were found in the DRC elections of 2018. The SADC election monitors also endorsed the DRC's presidential elections, which were heavily contested.⁴³⁵ The 2018 DRC elections were scheduled to be held in 2017. Kabila refused to stepdown and postponed elections for over a year. SADC did very little to uphold rule of law and democracy in the DRC.⁴³⁶ Therefore, in the case of SADC the region has failed in the above-named cases to uphold the integrity of elections. It is important that RECs should provide accurate reports for the purpose of protecting the integrity of elections and their integrity as institutions.

4.5 Protection of Human Rights and Democratic Elections

Democratic elections are linked to a range of human rights. Human rights are interdependent and interrelated. They are interdependent because all rights political, civil, social, cultural and economic are equal in importance and none can be fully enjoyed without the others.⁴³⁷ Each one contributes to the realization of a person's human dignity through the satisfaction of his or her developmental, physical, psychological and spiritual needs.⁴³⁸ The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others. For example, the right to vote paves way to enjoyment of other rights such as the right to political participation which includes women, disabled and the marginalised populations. Other freedoms and rights associated to

⁴³³ *Ibid.*

⁴³⁴ V Kare Op cit note 333.

⁴³⁵ SABC News 'Regional observers endorse Congo's election – with caveats', available at <http://www.sabcnews.com/sabcnews/regional-observers-endorse-congos-election-with-caveats/>, accessed on 31 August 2019.

⁴³⁶ SADC Electoral Advisory and Electoral Commissions Forum of SADC Countries (ECF-SADC) Conduct a Joint Electoral Assessment Mission to the Democratic Republic of Congo (2017), available at <https://www.sadc.int/news-events/news/sadc-electoral-advisory-seac-and-electoral-commissions-forum-sadc-countries-ecf-sadc-conduct-joint-electoral-assessment-mission/>, accessed on 31 July 2019.

⁴³⁷ Human Rights Principles | UNFPA - United Nations Population Fund, available at: <https://www.unfpa.org/resources/human-rights-principles>, accessed 30 November 2019.

⁴³⁸ *Ibid.*

this right such as freedom of assembly and freedom of expression are attained when the right to vote freely is attained.

To protect these rights, RECs have established regional courts and tribunals to provide protection of human rights in Africa.⁴³⁹ The RECs Courts are charged with resolving disputes related to the REC's treaty, protocols and conventions. For example, one of the prominent regional courts in Africa, the ECOWAS Court, which sits in Abuja, Nigeria, has jurisdiction over fifteen West African countries and has, since 2005, decided several individual human rights cases. For instance, in *Barthelemy Dias v. Republic of Senegal*⁴⁴⁰ the applicant, Barthelemy Dias, was a popular leading member of a Senegalese opposition party. He brought a case after the 2011 Senegalese election, alleging that Senegalese Democratic Party (SDP) members had organized armed thugs to eliminate opposition leaders at the time. He claimed that he was a victim of their attacks on 22 December 2011, in response to which he pulled out a firearm and fired shots in self-defence.⁴⁴¹ However, the court upon investigation dismissed all the allegations.⁴⁴²

On the other hand, in Zimbabwe several cases were brought to the SADC Tribunal.⁴⁴³ The Tribunal's first verdict at the end of 2008 was already a landmark case. Zimbabwe had enforced a highly controversial land redistribution policy in the early 1990s.⁴⁴⁴ The Tribunal decided in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* that the government's seizure of land owned by white farmers was indirect or 'de facto' discrimination and therefore unconstitutional and that the plaintiffs were entitled to compensation.⁴⁴⁵ Following this decision, Zimbabwe threatened to pull out of the SADC Tribunal, challenging its legitimacy.⁴⁴⁶

⁴³⁹ The courts adjudicate over cases, to interpret provisions of their treaties or to advise their principals on questions with implications for human rights.

⁴⁴⁰ *Barthelemy Dias v. Republic of Senegal* 23 March 2012, ECOWAS, Suit No. ECW/CCJ/APP/01/12, Judgment No. ECW/CCJ/JUG/05/12.

⁴⁴¹ Human Rights Decisions of the Community Court of Justice of West African States (ECOWAS) JULY 2013

⁴⁴² *Ibid.*

⁴⁴³ *Mike Campbell (Pvt) Ltd. and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* (124/06).

⁴⁴⁴ O C Ruppel & F X Bangamwabo Chapter 8 *The SADC Tribunal: A legal analysis of its mandate and role in regional integration*, 2008 at 3.

⁴⁴⁵ *Mike Campbell (Pvt) Ltd. and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* (124/06).

⁴⁴⁶ Centre for Human Rights 'Centre for Human Rights Welcomes Constitutional Court's Judgment on the invalidity of the disbandment of the SADC tribunal', 2018. Available at: https://www.up.ac.za/faculty-of-law/news/post_2740045-centre-for-human-rights-welcomes-constitutional-courts-judgment-on-the-invalidity-of-the-disbandment-of-the-sadc-tribunal, accessed 20 October 2019.

Although the President of Zimbabwe disrespected the tribunal leading to its suspension, the work of the tribunal was instrumental in protection of human rights of SADC nationals.

Within the RECs cases of human rights violations may be referred to the African Commission on Human and Peoples' Rights.⁴⁴⁷ The Commission accepts complaints from individuals, non-governmental organizations, and States, concerning alleged violations of the African Charter on Human and Peoples' Rights.⁴⁴⁸ There are several cases that have been brought before the Commission on elections and human rights.

In the case of *Jawara v. The Gambia*,⁴⁴⁹ the former head of state of the Gambia, alleged that the military government that unseated him violated, among other things, the right to receive information, freedom of expression, and freedom of assembly and association.⁴⁵⁰ The complainant's government was overthrown in a military coup in July 1994. According to the complainant, the incumbent military government had violated the African Charter of Human and Peoples' Rights by, inter alia: abolishing the Gambian Constitution's Bill of Rights; banning political parties and ministers of the former civilian government; killing soldiers affiliated with the civilian government; and arresting journalists without cause and detaining them without trial.⁴⁵¹

The arrest and detention of journalists breached Article 9 of the Charter,⁴⁵² which provides for the right to freedom of expression.⁴⁵³ The government of the Gambia provided no defence to the allegations and the Commission concluded there was a clear violation of the right to freedom of expression.⁴⁵⁴ Furthermore, the Commission concluded that the arrest, detention, expulsion, and intimidation of journalists deprived journalists of their right to disseminate

⁴⁴⁷ African Commission on Human and Peoples' Rights, available at: <https://www.achpr.org>, accessed 30 November 2019.

⁴⁴⁸ The *SERAC and CESR v. Nigeria* is also a good example of the case brought before the African Commission on violations of human rights. The African Commission held that Nigeria violated Articles 4, 14, 16, 18, and 24 of the African Charter by condoning and facilitating environmentally degrading and polluting practices of oil companies in traditional Ogoniland, through military force. The Commission urged the Nigerian government to stop military attacks on Ogoni communities. The Commission recommended that the government of Nigeria should provide compensation to the victims of these violations. Additionally, the Commission recommended that the government undertakes a comprehensive clean-up of the damage's lands and rivers, prepare appropriate environmental and social impact assessments for any future oil development.

⁴⁴⁹ *Sir Dawda K Jawara V. The Gambia* 147/95 and 149/96.

⁴⁵⁰ 'The African Commission'. Available at http://www.achpr.org/files/sessions/27th/comunications/147.95-149.96/achpr27_147.95_149.96_eng.pdf, accessed 17 October 2019.

⁴⁵¹ *Ibid.*

⁴⁵² Art 9 of the African Charter.

⁴⁵³ Op cit note 406.

⁴⁵⁴ *Ibid.*

opinions as well of the public of their right to information.⁴⁵⁵ The Commission emphasized that “the intimidation and arrest or detention of journalists for articles published and questions asked deprives not only the journalists of their rights to freely express and disseminate their opinions, but also the public, of the right to information”.⁴⁵⁶ It is important to note that the decisions of the Commission are not binding but persuasive to Member States.

4.6 State Reports and Concluding-Observations

African states are obliged to comply with treaties they have ratified pursuant to article 62 of the African Charter on Human and Peoples’ Rights.⁴⁵⁷ State parties are required to submit reports every two years on legislative or other measures taken to give effect to the rights and freedoms recognised and guaranteed by the African Charter.⁴⁵⁸ It is through state reporting that progress in democratic elections can be assessed by the RECs and the African Commission. States, in their reports, stipulate how elections have been conducted in their countries. In return the treaty bodies such as the African Commission issue recommendations on how elections can be improved within a member state. It is, therefore, important that states report to treaty bodies so that progress may be measured on their realisation of human rights.

The Gambia and Zimbabwe are state parties to the African Charter and are, thus, obliged to report periodically and timeously to the African Commission.⁴⁵⁹ Both Zimbabwe and the Gambia have not been consistent with reporting to the African Commission. For instance, Zimbabwe’s first periodic report was filed in 1991 and the second report was only filed in 2006.⁴⁶⁰ Since 2006, Zimbabwe failed to file further reports until 2019. In 2019 Zimbabwe filed a combined report for the period of 2007-2019.⁴⁶¹ The Gambia submitted a report to the African Commission in 1992. Its second report was submitted in 1994.⁴⁶²

To enhance democratic values, including democratic elections, the African Peer Review Mechanism (APRM) is another mechanism used by African States and the RECs to enhance democracy and good governance. The APRM was adopted as a self-monitoring instrument

⁴⁵⁵ Op cit note 406.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Art 62 of the African Charter on Human and People’s Rights, 1986.

⁴⁵⁸ The African Commission on Human and Peoples’ Rights, available at <https://www.achpr.org/states>, accessed 18 October 2019.

⁴⁵⁹ *Ibid*

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

voluntarily agreed upon by Member States of the African Union.⁴⁶³ Through the APRM, states can carry out periodic reviews on their progress towards the realisation of human rights. The APRM also ensures national ownership and leadership of the review processes.⁴⁶⁴ The mechanism allows the RECs to contribute effectively to monitoring the progress of human rights and ensuring accountability. There are 38 member states to the APRM including the Gambia. However, Zimbabwe is not a member.⁴⁶⁵ Although the Gambia is a member state, it is yet to be peer reviewed.⁴⁶⁶ Through APRM, African states have the capacity and opportunity to review their progress on electoral reforms and implementation of democratic elections. This has a positive effect in enhancing credible and legitimate elections.

Under the United Nations, the Gambia and Zimbabwe have both submitted reports through the Universal Periodic Review process. The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all UN Member States. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights in their countries and to fulfil their human rights obligations.⁴⁶⁷ As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights are assessed.⁴⁶⁸ The ultimate aim of this mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur. Currently, no other universal mechanism of this kind exists.⁴⁶⁹ Through UPR process, states may review their democratic elections since all human rights are interdependent and interrelated as stipulated in the Universal Declaration of Human rights.⁴⁷⁰

4.7 Conclusion

This chapter has shown that the RECs are committed to ensuring credible and legitimate elections as evidenced by obligations contained in various treaties. The chapter examined the role of the Regional Organizations (RECs) in upholding credibility and legitimacy of electoral processes in Africa. The chapter demonstrated that RECs are critical stakeholders in ensuring credible and legitimate elections within AU Member States. They have helped Member States

⁴⁶³ African Peer Review Mechanism, Available at <https://www.aprm-au.org/> accessed 11 November 2019.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ See preamble of the Universal Declaration of Human Rights, 1948.

comply with their international legal commitments on democratic elections.⁴⁷¹ The chapter also showed how RECs have dealt with election disputes through political dialogues, negotiations and mediation. RECs are protecting democratic elections through election monitoring and observation. In addition, elections are also protected by the RECs through regional courts and tribunals established by the RECs. Furthermore, the chapter demonstrated that human rights are interdependent and interconnected and that democratic elections are connected to many rights. No right can be enjoyed in isolation. Finally, this Chapter showed that, while RECs demonstrate commitment to ensure credible and legitimate elections in their regions, in practice, states often fail to comply with the REC's obligations.⁴⁷² States also often fail to report timeously to the treaty bodies. In some cases, states have failed to ratify treaty provisions to improve human rights and democratic elections in their domestic laws.⁴⁷³

⁴⁷¹G Lynch & G Crawford *'Democratization in Africa 1990-2010: An Assessment'* (2011).

⁴⁷² *Ibid.*

⁴⁷³ United Nations Human Rights, Office of the High Commissioner, 'UN Treaty Database'. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=45&DocTypeID=29, accessed on 30 October 2019.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study concludes that RECs are the linchpin and drivers for strong democratic institutions in Africa. As subsidiary bodies of the African Union they are complementing its work. Their broad mandate includes, economic, social and political integration, promotion and protection of democracy and human rights, and peace and security within their regions. In addition, they are advancing the AU's shared values, norms, and standards regarding continental unity, integration, peace and security. RECs are also involved in various transformative programs to enhance stability, development, and human rights. Apart from their broad mandate discussed, this study has demonstrated that RECs are committed to ensuring credible and legitimate elections as evidenced by obligations contained in various treaties. As shown in the study, RECs have helped Member States comply with their international legal commitments on democratic elections. They have dealt with election disputes through political dialogues, negotiations and mediation. They protect democratic elections through election monitoring and observation. Within the RECs elections have also been protected through regional courts and tribunals. This study, although acknowledging the importance of the RECs on democratic elections, also concludes that human rights are interdependent and interconnected. Therefore, democratic elections are connected to many rights. They cannot be enjoyed in isolation. Protection of the right to vote paves way to enjoyment of several human rights.

5.1.2 Role and Importance of the RECs

This study concludes that RECs are committed to ensuring credible and legitimate elections as evidenced by obligations contained in their various treaties and instruments. However, in practice, states have often failed to comply with the RECs and violated their international legal commitments. To ensure credibility and legitimacy of elections RECs should effectively play an important role in mediation, negotiation, and political dialogues within states in cases of election disputes. In addition, they should support Member States in pre- and post-electoral audits and electoral observations. More so, various structures and mechanisms such as the African Commission, Regional courts, Regional Review bodies such as the Africa Peer Review Mechanism (APRM) and Universal Periodic Review (UPR) should be fully utilised to enhance democratization and realization of human rights in Africa.

Apart from peaceful ways of protecting and promoting the credibility and legitimacy of elections, the ECOWAS military intervention in the Gambia election crisis offers lessons for other RECs in Africa and how they can promote and protect democratic elections. Other lessons include upholding presidential term limits and the respect of will of the people. The use of force in certain circumstances such as in the case of Gambia may be useful to protect human rights and the will of the people. However, the study concludes that RECs have not been free from challenges. The following are the conclusions that flow from the analysis of the study:

5.2 Conclusions

This study concludes that there is adequate legal framework governing democratic elections in Africa. The structures and mechanisms put in place by the RECs are adequate for democratization to be fully realised. Democratic elections are fundamental elements of human rights facilitating the realisation of other rights. Credible and legitimate elections must be conducted in accordance with the law and must reflect the will of the people. Marginalised groups such as women and youth should fully participate in the selection of their government. Regional organisations play an important role in protecting democratic elections and safeguarding the will of the electorates.

5.2.1 Legitimacy and Credibility of Elections

This study concludes that credible and legitimate electoral processes must meet international and regional standards as stipulated by the law. They must be respected by all key players in an election especially opposition parties, the independent electoral commissions, election observers and all stakeholders involved in an election. Most importantly, credible and legitimate elections are those which satisfy the loser. A loser must agree or have some consensus with the winner. As demonstrated in this study, most African governments have failed to provide an atmosphere in which losers concede losing elections peacefully. Furthermore, as earlier argued, human rights are interdependent, therefore when the right to vote is affected all other rights are affected. This study concludes that democratic elections are important to the realisation of several human rights. Without them several human rights cannot be fully enjoyed.

5.3 Recommendations

In view of the shortcomings identified in this study, the study would like to put forward the following recommendations:

5.3.1 Strengthening the Role of RECs in Mediation and Political Dialogue

RECs have dealt with election disputes through political dialogues, negotiations and mediations. This study recommends strengthening their role through building the conflict resolution capacity of REC leaders, politicians, and other key actors in governance structures.⁴⁷⁴ Strengthening capacity for REC leaders is important for the quality of work they will produce. For example, this would result in enhanced and quality mediation, negotiation skills for these leaders. When capacity building for REC leaders is successful, the institutions, structures and mechanisms for the RECs would serve their true purpose.

5.3.2 Strengthening the Election Observation Missions

Disputes over the legitimacy of election results in Africa could be reduced if the election observation missions (EOM) are transparent in their reporting. Premature endorsement of election results should be avoided, as was the case with the SADC region. This study recommends that elections observation should be strengthened by means of good, quality and regular training for election observers. Election Observers should also be selected from people of high moral character, and skilled professionals who would do their work without bias or being partisan.

5.3.3 The Role of RECs in Military Intervention and the Use of Sanctions

This study recommends the use of force as last resort by the RECs (in coordination with the AU PSC and the UN) in the event of violation of democratic elections when the mediation and negotiation efforts had failed. The case of the Gambia is a sound example. It is, therefore, recommended that apart from the use of force, the use of sanctions by the RECs in the event of violation of democratic elections are appropriate. The case of the ECOWAS region is a fitting example in this study.

5.3.4 State Reporting

This study recommends that States must report timely to treaty bodies. This may enhance and improve human rights within States. Through reporting to treaty bodies, States can do self-introspection on their progress. For instance, the APRM and UPR as reporting mechanisms for

⁴⁷⁴ UNDP, Supporting Insider Mediation: Strengthening resilience to conflict and turbulence, Available at: <https://www.undp.org/content/dam/undp/library/crisis%20prevention/Supporting-Insider-Mediation---Strengthening-Resilience-to-Conflict-and-Turbulence--EU%20Guidance%20Note.pdf>, accessed 30 November 2019.

States should be fully utilised by states for their good and improvement of human rights. RECs must play a key role to ensure that States fully participate in these mechanisms established.

5.3.5 Strengthening Opposition Parties

Opposition parties should be strengthened and allowed to freely participate and express themselves in a credible and legitimate election. Without their meaningful participation, the legitimacy and credibility of elections would remain contested. Strengthening could be done by means of building capacity of opposition leaders through REC electoral programs. Such leaders should receive support from the RECs during elections to ensure their rights are respected by the state and that they have free and fair ground for contesting the elections.

5.3.6 Improving transformative Programmes by the RECs

RECs have been central to various transformative programmes on the continent,⁴⁷⁵ these programs, such as APRM and UPR, should be enhanced to improve governance structures within African states. Ordinary citizens should know about these programmes and how their states participate in them. These transformative programmes, if taken seriously by States, should improve governance structures on the continent.

5.3.7 Functional Regional Courts

It is recommended that regional courts and tribunals must be respected by states. The case of the SADC court is a good example in which the court has been undermined and impunity was allowed to prevail. Politics should not be allowed to raise over human rights. Courts should have adequate jurisdiction to protect citizen's human rights within the region. This study recommends that if States are unwilling to protect fundamental human rights of their citizens and to comply with regional courts, sanctions and in some cases the use of force is necessary from the RECs.

Finally, it can be said that regional organizations play an important role in democratization and protection of democratic elections. Although there are challenges in the protection of democratic elections among the RECs, their role may not be underestimated. RECs presence, since their establishment, has made a difference in enhancing democratization in Africa.

⁴⁷⁵ These include but not limited to the New Partnership for Africa's Development (NEPAD) adopted in 2001, and the AU's Agenda 2063 adopted by its Summit in January 2015

APPENDICES

APPENDIX A: BIBLIOGRAPHY

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